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MANAGEMENT OF GROUNDWATER THROUGH MANDATORY CONSERVATION

MICHAEL J. KELLY*

INTRODUCTION

Groundwater,[1] which is located in rock and soil formations beneath the earth's surface, constitutes a substantial proportion of the water used in the United States.[2] In recent decades, national water use has increased dramatically,[3] placing strains on these underground supplies. The western states[4] are particularly reliant on groundwater sources,[5] and many of them, as well as some eastern states, have sizeable areas that are withdrawing more groundwater from aquifers[6] than is being replenished through such means as rainfall and stream inflow.[7] This situation, known as groundwater over-

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1. Geologists usually limit the definition of "groundwater" to water beneath the "water table," the subsurface depth at which the rock or soil in a particular area is saturated with water. *See* C. FETTER, JR., APPLIED HYDROGEOLOGY 5 (1980); R. FREEZE & J. CHERRY, GROUNDWATER (1979). Legal rules for "groundwater" use do not distinguish between subsurface water below the water table and that which is above the water table, but they sometimes do distinguish between different types of subsurface water. In a number of states, subsurface water is classified as either percolating or part of an underground stream. *See* W. HUTCHINS, WATER RIGHTS LAW IN THE NINETEEN WESTERN STATES 631-34 (1974) (chapter on groundwater rights by W. Champion); Aiken, *Nebraska Groundwater Law and Administration*, 59 NEB. L. REV. 917, 937-38 (1980). Use of percolating subsurface water is governed by the state's rules for "groundwater" withdrawals, while use of water comprising an underground stream is governed by the state's rules for surface water exploitation. *See* W. HUTCHINS, *supra*, at 633.

In this article, "groundwater" refers to all subsurface water, and it is assumed that the legal rules for use of "groundwater" apply to the use of all subsurface water. Because only a small fraction of subsurface water exists as underground streams, this assumption is reasonable. W. HAMBLIN, THE EARTH'S DYNAMIC SYSTEMS 210 (1975).

2. *See* C. FETTER, *supra* note 1, at 3; R. FREEZE & J. CHERRY, *supra* note 1, at 6-7.

3. *See* C. FETTER, *supra* note 1, at 2-3 (from 1955 to 1970, total water usage in the U.S., excluding that for hydroelectric power generation, increased by 54 percent).

4. In this article, the seventeen western states are those continental states west of the ninety-eighth meridian: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

5. *See* R. FREEZE & J. CHERRY, *supra* note 1, at 6.

6. Rock and soil layers that can store and transmit groundwater fast enough to supply wells with reasonable amounts of water are known as groundwater basins or aquifers. C. FETTER, *supra* note 1, at 92. Geologists use a variety of terms to describe rock and soil layers that are too impermeable to support productive wells. *See, e.g., id.* at 93 (using the term "confining layer"); R. FREEZE & J. CHERRY, *supra* note 1, at 47 (using the term "aquitard").

7. *See, e.g.*, U.S. WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES—1975-2000, at 11-17 (1978) [hereinafter cited as WATER RESOURCES COUNCIL]; *id.* at 4 SOUTH ATLANTIC-GULF REGION 27; *id.* at 4 MID-ATLANTIC REGION 26-27; J.W. WRIGHT, THE COM-

draft,[8] threatens both the quantity and quality of groundwater supplies.[9]

Unfortunately, the prevailing legal doctrines regulating groundwater rights are inadequate to control groundwater depletion. This article argues that effective control of groundwater overdraft can be achieved through adoption of a groundwater management plan that imposes mandatory, need-based quotas on all groundwater users. Because it authorizes the state to restrict the pumping rights of current groundwater users, however, such a plan is subject to the challenge that it is an unconstitutional taking of property without compensation. This article further asserts that, despite the uncompensated curtailing of current users' pumping rights, a mandatory conservation plan for controlling groundwater overdraft should be upheld as a constitutional exercise of the police power.

Part I of this article analyzes the prevailing common law and statutory groundwater property systems, and concludes that they do not provide a satisfactory means of controlling groundwater overdraft. It then discusses the advantages of combatting depletion through the use of mandatory, need-based quotas applied to all groundwater pumpers. Part II argues that, although there are precedents suggesting otherwise, applying such restrictions to existing groundwater users would not constitute an illegal, uncompensated taking of private property. Both the public rights theory and more traditional takings theories support this result.

ING WATER FAMINE 28 (1966); GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 135-40 (Dec. 1978) [hereinafter cited as CAL. COMM'N REPORT]; NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 231, 238-39 (Final Report 1973) [hereinafter cited as NAT'L WATER COMM'N]; Comptroller General, Ground Water Overdrafting Must Be Controlled i-ii (General Accounting Office, Sept. 12, 1980); Lowe, Ruedisili, and Graham, *Beyond Section 858: A Proposed Ground-Water Liability and Management System for the Eastern United States*, 8 ECOLOGY L.Q. 132-33, 149 (1979). In some places, the amount of overdraft is extreme, making overdraft a particularly critical problem. WATER RESOURCES COUNCIL, *supra*, at 11. For example, in Pima County, Arizona, which includes the city of Tucson, 4.7 times more groundwater is being pumped than is being recharged. ARIZONA GROUNDWATER MANAGEMENT STUDY COMMISSION, FINAL REPORT 1-3 (June 1980) (citing 1975 ARIZONA WATER COMMISSION STUDY) [hereinafter cited as ARIZ. STUDY COMM'N] Tucson depends entirely on groundwater for its water supply. Higdon & Thompson, *The 1980 Arizona Groundwater Management Code*, 1980 ARIZ. ST. L.J. 621, 623 n.6 (citing Arizona Daily Star).

8. *See, e.g.*, C. FETTER, *supra* note 1, at 389; E. JOHNSON, INC., GROUNDWATER AND WELLS 414 (1966). The term "mining" is also used. *See, e.g.*, Aiken & Supalla, *Ground Water Mining and Western Water Rights Law: The Nebraska Experience*, 24 S.D.L. REV. 607, 608 (1979).

A related concept is "safe yield", which is defined as the rate at which water can be withdrawn from a groundwater basin without producing an undesired result. *See* C. FETTER, *supra* note 1, at 477; R. FREEZE & J. CHERRY, *supra* note 1, at 364. Safe yield used to be considered equivalent to the amount of water that could be withdrawn annually without creating overdraft. C. FETTER, *supra* note 1, at 385. But conceptions of "undesired result" have expanded, giving rise to uncertainty as to how to calculate safe yield. *See id.* at 385-86; R. FREEZE & J. CHERRY, *supra* note 1, at 364-65. A further complication in calculation of safe yield is that overdraft does not always decrease the net availability of groundwater. *See infra* note 10.

9. *See infra* notes 10-14 and accompanying text.

Although importation of surface water has been suggested as a solution to overdraft, it is largely infeasible because of its cost and legislation protecting water supplies in areas of origin. *See infra* note 41.

I. GROUNDWATER OVERDRAFT AND GROUNDWATER PROPERTY SYSTEMS

Groundwater overdraft is an increasingly widespread phenomenon that causes serious problems. As water is withdrawn from an aquifer, the water level drops, making pumping increasingly difficult and expensive. If overdraft is sustained, the groundwater source will eventually be exhausted or pumping may become so uneconomical as to be infeasible.[10]

Besides increased pumping expense and depletion of groundwater supplies, overdraft can create other problems. Groundwater and surface water are hydrologically connected;[11] therefore, overdraft can lead to sharp decreases in the availability of surface water.[12] Furthermore, sustained overdraft can cause the porous material surrounding an aquifer to compact, which can reduce the storage capability of the aquifer and cause overlying land to subside.[13] Saltwater contamination of the groundwater supply can also result from overdraft.[14]

The prevailing legal doctrines regulating groundwater use were developed primarily to resolve conflicts among individual users, not to prevent depletion of groundwater supplies. Consequently, the doctrines have been ineffective in managing overdraft and in preventing the problems it creates. The following section of this article describes and evaluates these doctrines and then presents an alternative approach for managing groundwater.

A. *The Common Law Groundwater Doctrines*

Under the common law, an individual's right to use groundwater arises

10. An aquifer may actually become "economically depleted" before all water has been pumped from it. Aiken & Supalla, *supra* note 8, at 608. In Texas, for example, increased drilling costs associated with a declining water table have reduced the amount of drilling for groundwater from the Ogallala aquifer underlying the High Plains. Trelease, Legal Solutions to Groundwater Problems—A General Overview (address delivered at the Twelfth Biennial Conference on Groundwater, Sacramento, Cal.) (Sept. 20, 1979), *reprinted in* 11 PAC. L.J. 863, 864, 871 (1980). *See also* The Wall Street Journal, Oct. 12, 1982, at 33, col. 1 (citing Kansas City Federal Reserve Bank study predicting reduced feedlot business in Kansas, Oklahoma and Texas primarily because of unavailability of groundwater for producing feed). Under certain circumstances, temporary, limited overdraft can increase, rather than decrease, the net availability of groundwater by stimulating the outflow of water from surrounding, permeable material. *See* C. FETTER, *supra* note 1, at 379, 394-96.

11. Groundwater feeds streams and other surface water bodies, and surface water recharges aquifers. NAT'L WATER COMM'N, *supra* note 7, at 233.

12. C. FETTER, *supra* note 1, at 385 (groundwater withdrawals may reduce streamflow, which in turn would lower lake levels and dry wetlands); W. HAMBLIN, *supra* note 1, at 225; NAT'L WATER COMM'N, *supra* note 7, at 233-34. Conflicts between users of groundwater and users of surface water are well-documented. *See, e.g.*, Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968); NAT'L WATER COMM'N, *supra* note 7, at 233-34; Harrison & Sandstrom, *The Groundwater-Surface Water Conflict And Recent Colorado Legislation*, 43 U. COLO. L. REV. 1, 20-22 (1971).

13. R. FREEZE & J. CHERRY, *supra* note 1, at 370; W. HAMBLIN, *supra* note 1, at 228; Trelease, *supra* note 10, at 871-72. A groundwater aquifer is regarded by many as superior to an above-ground storage reservoir because water is not lost to evaporation and the stored water is not subjected to atmospheric pollutants, such as acid rain.

14. R. FREEZE & J. CHERRY, *supra* note 1, at 375; W. HAMBLIN, *supra* note 1, at 225; Trelease, *supra* note 10, at 872. Salt water can intrude into the aquifer either from the ocean or from saltwater brines trapped in sandstone surrounding the aquifer. *Id.*

from ownership of the overlying land. One of the three common law doctrines, absolute ownership, reasonable use, or correlative rights, is used in most of the eastern states and in the four western states that account for sixty one percent of the total groundwater overdraft in that region.[15]

The absolute ownership doctrine was first articulated in 1843 in the English case of *Acton v. Blundell*.[16] Knowing little about groundwater,[17] the Court of Exchequer Chamber applied the doctrine that he who owns the land also owns everything beneath the land,[18] and held that the owner of a parcel of land has an unrestricted right to capture groundwater through pumping on the parcel.[19]

The right of absolute ownership was the first groundwater ownership rule to be used in the United States.[20] Contrary to the Court of Exchequer Chamber's characterization, subsequent decisions held that under the absolute ownership doctrine landowners do not actually own the water beneath their land. Rather, they have an unrestricted entitlement to pump on their land, even if the pumping dries up the wells of their neighbors.[21] At first, the doctrine permitted even malicious pumping;[22] but later most states modified the rule to prohibit such acts.[23] Aside from this minor restriction, the doctrine places no limits on groundwater withdrawals, and consequently can neither prevent nor correct an overdraft situation. Although Texas still follows the absolute ownership rule, most states have now rejected it.[24]

New Hampshire was the first. In *Bassett v. Salisbury Manufacturing Co.*,[25]

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15. *See* Johnson, *The 1980 Arizona Groundwater Management Act and Trends in Western States Groundwater Administration and Management: A Minerals Industry Perspective*, 26 ROCKY MTN. MIN. L. INST. 1031, 1035-36 (1980). The four western states are: Arizona, California, Nebraska, and Texas. Arizona recently enacted a statute that regulates much of the groundwater pumping in the state. *See infra* note 66.

16. 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. Ch. 1843).

17. The court recognized its ignorance, referring to groundwater's mysterious source and movement. *Id.* at 350, 152 Eng. Rep. at 1233.

18. *Id.* at 353-54, 152 Eng. Rep. at 1235.

19. *Id.* at 354, 152 Eng. Rep. at 1235.

20. *See* Moses, *Basic Groundwater Problems*, 14 ROCKY MTN. MIN. L. INST. 501, 505-06, 522 (1968).

21. *See, e.g.*, Williams v. City of Wichita, 190 Kan. 317, 329-30, 374 P.2d 578, 588 (1962). In *Acton*, for example, pumping by the defendant lowered the water level in the well of the plaintiff, an adjoining landowner. The plaintiff was denied relief because the defendant was said to have an unrestricted right to pump groundwater. 12 M. & W. at 354, 152 Eng. Rep. at 1235. Such a result is inconsistent with the idea that the plaintiff actually owned the water beneath his land.

22. *See, e.g.*, Huber v. Markel, 117 Wis. 355, 363, 94 N.W. 354, 357 (1903) (defendant permitted to pump at full capacity, 24 hours a day, even though not using much of the water pumped), *overruled in* State v. Michels Pipeline Construction, Inc., 63 Wis. 2d 278, 294-98, 217 N.W.2d 339, 346-48 (1974).

23. *See, e.g.*, Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 696, 72 N.E. 849, 851 (1904) (appellate court upheld enjoining of pumping from wells whose owners were attempting to stop the flow from plaintiff's well); City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 293-94, 276 S.W.2d 798, 801 (1955) (dictum).

24. Texas's adherence to the absolute ownership rule was recently reaffirmed, with some legislative modification to protect neighboring landowners from land subsidence. *See* Friendswood Dev. Co. v. Smith-Southwest Indus., 576 S.W.2d 21 (Tex. 1978). The rule apparently still prevails in the country of its origin. *See* Langbrook Properties, Ltd. v. Surrey County Council, [1969] 3 All E.R. 1424, 1439-40.

25. 43 N.H. 569 (1862).

the state supreme court, emphasizing the interdependence of groundwater users who pump from a common pool, adopted the rule of reasonable use.[26] That rule, which is still widely followed in the East,[27] allows overlying landowners to capture unlimited amounts of groundwater as long as they apply the water to reasonable uses of their property.[28] Like the absolute ownership rule, the reasonable use doctrine holds that the owner of a parcel of land has no ownership right in the corpus of water beneath the parcel. Only when water comes into the landowner's control does it become his personal property.[29]

The reasonable use doctrine differs from the absolute ownership rule in two respects. First, it restricts transportation of groundwater, holding that groundwater can be used only on the parcel of land from which it was pumped, and provides injunctive relief and damages to a neighboring user injured as a result of an illegal transfer.[30] Second, the reasonable use rule bans flagrantly wasteful uses of groundwater,[31] and provides injunctive relief to an injured neighboring pumper.[32]

Neither of these restrictions, however, is equipped to solve a basin-wide groundwater overdraft problem. Courts have not always enforced the restriction on transportation of groundwater.[33] Although it is a pervasive rule in water law,[34] courts rarely interpret the doctrine against waste to declare a

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26. *Id.* at 573-77.

27. *See, e.g.*, Jones v. Oz-Arc-Val. Poultry, 228 Ark. 76, 306 S.W.2d 111 (1957); Higday v. Nickolaus, 469 S.W.2d 859 (Mo. Ct. App. 1971); Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A.2d 87 (1940).

28. Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 666 (Fla.), *cert. denied*, 444 U.S. 965 (1979); Higday v. Nickolaus, 469 S.W.2d 859, 866 (Mo. Ct. App. 1971); Meeker v. City of East Orange, 77 N.J.L. 623, 638, 74 A. 379, 385 (1909); Drummond v. White Oak Fuel Co., 104 W. Va. 368, 375-76, 140 S.E. 57, 60 (1927).

29. Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 82, 638 P.2d 1324, 1328 (1981); Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 667 (Fla.), *cert. denied*, 444 U.S. 965 (1979).

30. Farmers Investment Co. v. Bettwy, 113 Ariz. 520, 558 P.2d 14 (1976) (en banc); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Schenk v. City of Ann Arbor, 196 Mich. 75, 163 N.W. 109 (1917); Forbell v. City of New York, 164 N.Y. 522, 58 N.E. 644 (1900); Higday v. Nickolaus, 469 S.W.2d 859 (Mo. Ct. App. 1971).

31. Aiken & Supalla, *supra* note 8, at 612; Harnsberger, Oeltjen, & Fischer, *Groundwater: From Windmills to Comprehensive Public Management*, 52 NEB. L. REV. 179, 205 (1973). The rule against waste, once solely a common law rule, *see* Basinger v. Taylor, 36 Idaho 591, 596-97, 211 P. 1085, 1086 (1922); De Bok v. Doak, 188 Iowa 597, 604-05, 176 N.W. 631, 633 (1920); Barclay v. Abraham, 121 Iowa 619, 624, 96 N.W. 1080, 1082 (1903); Stillwater Water Co. v. Farmer, 89 Minn. 58, 63, 93 N.W. 907, 909 (1903); Doherty v. Pratt, 34 Nev. 343, 348, 124 P. 574, 576 (1912), has since been codified in statutes regulating both groundwater and surface water. *See, e.g.*, COLO. REV. STAT. §§ 37-90-107(5), 37-92-103(4), 37-92-502 (1973); MONT. CODE ANN § 85-2-505 (1981); NEB. REV. STAT. 46-265 (1978); OKLA. STAT. ANN. tit. 82, § 1020.9 (West Supp. 1982).

32. *See, e.g.*, De Bok v. Doak, 188 Iowa 597, 176 N.W. 631 (1920) (use of groundwater for standing pond in which hogs wallowed enjoined); Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N.W. 907 (1903) (diverting groundwater into city sewer enjoined).

33. *See, e.g.*, Jarvis v. State Land Dep't, 106 Ariz. 506, 479 P.2d 169 (1970). In *Jarvis*, a municipality transported groundwater in violation of the reasonable use rule, but the Arizona Supreme Court allowed the transportation. The court invoked the state's preference statute, which gives preference to municipalities over irrigators in the processing of applications for *surface* water permits. Id. at 511, 479 P.2d at 174.

34. *See supra* note 31.

use unreasonable or to require restrictions on pumping.[35] Moreover, courts define waste according to local custom, allowing many inefficient uses simply because they are standard practice.[36] Thus, the reasonable use doctrine, as applied by the courts, does not significantly limit the quantity of groundwater landowners may use on their overlying land, and cannot prevent the development of an overdraft problem or correct an existing problem.

Only the third common law doctrine, the correlative rights rule, anticipates the possibility of a groundwater shortage. The rule was developed in California in recognition of the arid conditions existing in many areas of the state,[37] and today is followed most conspicuously in that state.[38] In addition to prohibiting wasteful uses of groundwater, the correlative rights rule requires that all users "share" groundwater shortages. When a water scarcity develops, the rule proportionately cuts back pumping and allows each user the right to draw a "reasonable share" of the available water.[39] California courts have determined share size on the basis of past use:[40] for example, if a

35. Clark, *Background And Trends In Water Salvage Law*, 15 ROCKY MTN. MIN. L. INST. 421, 461 (1969). Professor Sax reviewed the Utah Supreme Court's interpretations of the waste doctrine and concluded that, although the court often expounds the need to avoid waste, it rarely enjoins allegedly wasteful uses. J. SAX, WATER LAW, PLANNING & POLICY 273 (1968). In City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955), the Texas Supreme Court held that transporting groundwater in natural channels 118 miles from where it was pumped would not be enjoined, even though evidence showed that 63 to 74 percent of the water was lost to evaporation, transpiration, and seepage when it was being transported. *Id.* at 291, 276 S.W.2d at 800. Once the court determined that the end use of the water was lawful, it made no further inquiry into how the groundwater was being transported or used, and deferred to the legislature to decide that particular means of transporting water are wasteful.

36. A study of the waste doctrine as it has been applied in certain appropriation states, *see infra* text accompanying notes 47-54, concludes that "custom is unquestionably the most important factor bearing upon the waste standard." Note, *Water Waste—Ascertainment and Abatement*, 1973 UTAH L. REV. 449, 454. Community custom was used as a standard to judge the wastefulness of the use of groundwater and surface water in Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935); acts resulting in the loss of 40 to 45 percent of water while it was being transported were not enjoined. Note, *supra*, at 455; *Tulare Irrigation Dist.*, 3 Cal. 2d at 572-73, 45 P.2d 1009-10. It seems that, because the costs of remedying a wasteful use are often significant, courts, out of a sense of equity, refuse to place the costs on an individual user. *See* Pring & Tomb, *License to Waste: Legal Barriers to Conservation and Efficient Use of Water in the West*, 25 ROCKY MTN. MIN. L. INST. 25-1, 25-19 (1979). The courts' reluctance to question wasteful local custom places the burden on legislatures to prevent wasteful uses.

37. Katz v. Walkinshaw, 70 P. 663 (Cal. 1902), *rev'd on rehearing*, 141 Cal. 116, 74 P. 766 (1903). Both Justice Temple, in the original decision, and Justice Show, in the rehearing, recognized that the common law of groundwater use and regulation must be adapted to the arid conditions in Southern California. *See* 70 P. at 665-66; 141 Cal. at 123-24, 74 P. at 767-69, 772-73. *See also* Barton v. Riverside Water Co., 155 Cal. 509, 516, 101 P. 790, 793 (1909).

38. The correlative rights doctrine is also followed in Nebraska, see Prather v. Eisenmann, 200 Neb. 1, 6-7, 261 N.W.2d 766, 769-70 (1978); Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933), and in New Jersey, see Woodsum v. Township of Pemberton, 172 N.J. Super. 489, 510, 412 A.2d 1064, 1075 (1980), *aff'd*, 177 N.J. Super. 639, 427 A.2d 615 (1981).

39. *See, e.g.*, City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 926, 207 P.2d 17, 30 (1949), *cert. denied*, 339 U.S. 937 (1950); Katz v. Walkinshaw, 141 Cal. 116, 135-36, 74 P. 766, 772 (1903); Prather v. Eisenmann, 200 Neb. 1, 5, 261 N.W.2d 766, 771 (1978); Woodsum v. Township of Pemberton, 172 N.J. Super. 489, 501-02, 412 A.2d 1064, 1071 (1980), *aff'd*, 177 N.J. Super. 639, 427 A.2d 615 (1981).

40. California has a complicated system for determining who is entitled to share in the available water. Groundwater users include both overlying landowners and "appropriators" (non-overlying users). Overlying landowners have equal rights to the available water except as to share size. Hudson v. Dailey, 156 Cal. 617, 628, 105 P. 748, 753 (1909). Appropriators'

thirty percent reduction in withdrawals from a groundwater basin is necessary to eliminate overdraft, each groundwater user is required to pump thirty percent less water than in the past.[41]

California courts, however, have restricted rights to pump groundwater only where supplemental surface supplies were available to make up the shortage.[42] Rather than using the correlative rights doctrine to force groundwater users to reduce water consumption, California courts have used

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rights, however, are subordinate: their use can be completely cut off if necessary to protect overlying landowners. City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 926, 207 P.2d 17, 28-29 (1949). "As between appropriators . . . the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a subsequent appropriator may take any." *Id.* at 926, 207 P.2d at 29.

If, however, appropriators use groundwater for a certain period of time and under certain conditions, their appropriative rights are converted into "prescriptive" rights, which are equal in status to the rights of overlying landowners. *Id.* at 926-33, 207 P.2d at 28-29. An appropriative right "ripen[s] into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the statutory period of five years, and under a claim of right." *Id.* at 926-27, 207 P.2d at 29.

Overdraft can qualify as an adverse use, California Water Serv. Co. v. Edward Sidebotham & Son, 224 Cal. App. 2d 715, 726, 37 Cal. Rptr. 1, 7 (1964), if the prescripted parties have notice that overdraft is occurring. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 282, 537 P.2d 1250, 1311, 123 Cal. Rptr. 1, 62. Such rights, however, cannot be acquired against public entities. *Id.* at 270-77, 537 P.2d at 1301-07, 123 Cal. Rptr. at 52-58. Because prescriptive rights are limited to acquisition only against private parties, their usefulness to control groundwater pumping is limited. Often the pumping of groundwater by municipalities accounts for the majority of a basin's overdraft, *see* Gleason, Los Angeles v. San Fernando: *Ground Water Management in the Grand Tradition*, 4 HASTINGS CONST. L.Q. 703, 704, 706 (1977), and enforcing prescriptive rights only against private users would be inequitable.

41. *See, e.g.*, City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 933, 207 P.2d 17, 32-33 (1949); California Water Serv. Co. v. Edward Sidebotham & Son, 224 Cal. App. 2d 715, 727, 37 Cal. Rptr. 1, 8 (1964). *But see* Tehachapi-Cummings County Water Dist. v. Armstrong, 49 Cal. App. 3d 992, 1000, 122 Cal. Rptr. 918, 924 (1975) (calculating share size not on past use, "but solely on . . . current reasonable and beneficial need for water"). Because the courts in these and other cases relied on the doctrine of mutual prescription as the basis for forcing reductions in pumping, *see, e.g.*, *City of Pasadena*, 33 Cal. 2d at 924-33, 207 P.2d at 28-33, and since that doctrine cannot be applied against municipalities, *see* note 40 *supra*, it is not clear how share size will be determined where a municipality is a party to an adjudication of a groundwater basin. It is not yet clear how Nebraska and New Jersey courts will assess share size. *See* Prather v. Eisenmann, 200 Neb. 1, 9, 261 N.W.2d 766, 771 (1978); Woodsum v. Township of Pemberton, 172 N.J. Super. 489, 510-12, 412 A.2d 1064, 1075-76 (1980), *aff'd*, 177 N.J. Super. 639, 427 A.2d 615 (1981).

42. J. BAIN, R. CAVES, & J. MARGOLIS, NORTHERN CALIFORNIA'S WATER INDUSTRY 454-55 (1966); CAL. COMM'N REPORT, *supra* note 7, at 146; Aiken & Supalla, *supra* note 8, at 616-17; Krieger & Banks, *Ground Water Basin Management*, 50 CALIF. L. REV. 56, 61, 69 (1962); Trelease, *supra* note 10, at 865-66. Because of the unavailability of alternative sources of water nearby, and the expense of and legal barriers to importing water from distant points, imported water may be difficult or impossible to obtain in the future. Trelease, *supra* note 10, at 866.

For the same reasons, prospects for importing water to solve overdraft problems occurring outside of California are also dim. *See, e.g.*, Johnson, *supra* note 15, at 1033; Pring & Tomb, *supra* note 36, at 25-2; Schad, *Western Water Resources: Means to Augment the Supply*, in WESTERN WATER RESOURCES: COMING PROBLEMS AND THE POLICY ALTERNATIVES 113, 120 (1980); Henry, *Commentary*, in *Id.* 134, 135-36; The University of California Agricultural Issues Task Force, Agricultural Policy Challenges for California in the 1980's, at 17, 18 (1978). *See generally* R.H. BOYLE, J. GRAVES, & T.H. WATKINS, THE WATER HUSTLERS (1971).

Although Orange County, California's use of water imported from the Colorado River to augment its supply of groundwater is often cited as an example of good conjunctive management of groundwater and surface water supplies, *see, e.g.*, NAT'L WATER COMM'N, *supra* note 7, at 235; K. Buckwalter, Management of Groundwater in Southern California 29-34 (spring 1970) (unpublished paper in Stanford Law School Library), it will be interesting to evaluate that management plan once Orange County's supply from the Colorado River is reduced in

the doctrine merely to allocate the cost of importing supplemental surface supplies to the overdrafted basin.[43]

Even assuming that courts could implement the doctrine to curtail pumping when no alternative sources of water were available, the correlative rights rule is an inappropriate vehicle for resolving overdraft problems. Because share size is based on past use, users who anticipate court adjudication of rights to pump from their groundwater basin may increase their current withdrawals in hopes of maximizing their future shares.[44] This "race to the pumphouse" creates inequities[45] and accelerates depletion of groundwater supplies.[46]

Thus, although the correlative rights doctrine is more sensitive to overdraft problems than are other common law doctrines, it nevertheless does not provide a satisfactory means of combatting groundwater depletion. Numerous commentators have criticized the common law doctrines for this failure.[47]

B. *The Prior Appropriation Doctrine: A Statutory Approach to Regulating Groundwater Use*

Most of the western states have replaced the common law groundwater schemes with "prior appropriation" statutes.[48] Because these statutes pro-

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order to supply the Central Arizona Project. Kovitz, *Water Experts See Mid-Decade Crisis in Southland*, Los Angeles Times, May 10, 1981, Part IX (Real Estate), at 1.

43. *See, e.g.*, the description of the management plans developed pursuant to adjudications of the Central and West Basins, the Upper San Gabriel Valley, and the Chino Basin, in A. Schneider, Groundwater Rights in California, Staff Paper No. 2, Governor's Comm'n To Review California Water Rights Law 50-58 (1977).

44. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 267, 537 P.2d 1250, 1299, 123 Cal. Rptr. 1, 50 (1975); Gleason, *supra* note 40, at 709. Krieger & Banks, *supra* note 42, at 61-62.

45. Those who do not participate in the race will receive relatively small shares when the rights in the basin are adjudicated and will therefore have greater difficulty adjusting to the reduced supply than will their greedy fellow users.

46. Gleason, *supra* note 40, at 709.

47. *See, e.g.*, Comptroller General, *supra* note 7, at iii; Trelease, *supra* note 10, at 865-68; Clark, *The Role of State Legislation in Ground Water Management*, 10 CREIGHTON L. REV. 469, 475 (1977).

48. *See* Radosevich, *Better Use of Water Management Tools*, in WESTERN WATER RESOURCES 253, 258-59 (1979). California, Nebraska and Texas, the three common law states in the West, plus Arizona, which was a common law state until 1980, see Johnson, *supra* note 15, at 1031, 1035 n.15, account for 61% of the total groundwater overdraft occurring in the West. *Id.* at 1035-36. In this article, Nebraska will be considered a common law state because of the limited application to date of its groundwater management statute. *See infra* note 82.

A few eastern states have enacted statutes that provide for comprehensive regulation of groundwater. *See, e.g.*, FLA. STAT. ANN. §§ 373.013 to -.617 (West 1974 & Supp. 1983); IOWA CODE ANN. §§ 455A.1-A.40 (West 1971 & Supp. 1983); KY. REV. STAT. ANN. §§ 151.010 to -.990 (Bobbs-Merrill 1980 & Supp. 1982); MINN. STAT. ANN. §§ 105.37 to -.81 (West 1977 & Supp. 1983).

The Kentucky statute has been criticized because it exempts a large number of uses from regulation. Ausness, *Water Use Permits in a Riparian State: Problems and Proposals*, 66 KY. L.J. 191, 229-32 (1977). A review of the first ten years of administration of the Iowa statute indicates that, although almost every request for a water use permit was granted, permits were not always granted for the amount of water requested. Hines, *A Decade of Experience Under The Iowa Water Permit System—Part One*, 7 NAT. RESOURCES J. 499, 532-35 (1967).

Georgia's Groundwater Use Act of 1972, GA. CODE ANN. §§ 17-1101 to -1115 (Supp. 1981) and South Carolina's Groundwater Use Act of 1969, S.C. CODE ANN. §§ 49-5-10 to 49-5-120

vide for quantification of existing rights to pump groundwater, they are superior to the common law which relies on expensive, time-consuming litigation to define pumping rights. Although many of the statutes preserve common law groundwater rights that existed on the effective date of the statute,[49] most declare that all unclaimed groundwater in the state belongs to the public,[50] and that any subsequent users must obtain a permit before pumping.[51]

Prior appropriation statutes do not base the right to pump groundwater on ownership of the overlying land. Rather, they establish a first-in-time, first-in-right priority system among users.[52] In times of shortage, junior appropriators, the last to obtain permits, may have their rights to pump completely curtailed to protect the water supply of senior appropriators.[53] Frequently, the statutes also provide that water rights can be lost if not exercised.[54] Thus, prior appropriation statutes can be used to prevent serious overdraft problems from developing.[55]

Nonetheless, they have critical drawbacks. Under prior appropriation

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(Law. Co-op. 1977), both require users who pump more than 100,000 gallons per day to obtain a permit.

49. *See, e.g.*, ALASKA STAT. § 46.15.060 (1982); IDAHO CODE § 42-226 (Supp. 1983); KAN. STAT. ANN. §§ 82a-701(d) to -703 (1977 & Supp. 1982); OR. REV. STAT. § 537.585 (1981).

50. *See, e.g.*, IDAHO CODE § 42-226 (Supp. 1983); MONT. CODE ANN. § 85-2-101 (1981); WASH. REV. CODE ANN. § 90.44.040 (1962). *But see* COLO. REV. STAT. § 37-90-109 (1973 & Supp. 1982) (abolishing existing rights, but giving the holders of those rights priority under the prior appropriation statute).

51. *See, e.g.*, IDAHO CODE § 42-229 (1977); MONT. CODE ANN. § 85-2-302 (1981); WASH. REV. CODE § 90.44.050 (1962); WYO. STAT. ANN. § 41-3-905 (1977) (permit required before building well). Many statutes require *all* groundwater pumpers to obtain a permit, regardless of whether the pumper has a common law right that is preserved under the statute. *See, e.g.*, ALASKA STAT. §§ 46.15.040, 46.15.065 (1982); OR. REV. STAT. §§ 537.585-610 (1981).

52. *See, e.g.*, ALASKA STAT. § 46.15.050 (1982); IDAHO CODE § 42-226 (Supp. 1983); WASH. REV. CODE ANN. § 90.44.130 (1962).

53. *See, e.g.*, Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973) (junior appropriator can be enjoined from further pumping where overdraft is occurring). *Cf.* Mathers v. Texaco Inc., 77 N.M. 239, 421 P.2d 771 (1966) (senior appropriator's rights not impaired when junior appropriator permitted to pump, even though aquifer is being mined). These cases illustrate contrasting means of determining when groundwater is so scarce that junior appropriators can be enjoined from further pumping. While Idaho law restricts pumping by junior appropriators whenever overdraft is occurring, *see* IDAHO CODE § 42-237a(g) (Supp. 1983), New Mexico gives its State Engineer broad discretion to determine when there is sufficient water for later appropriators. For example, in *Mathers* he determined that water could be appropriated from an essentially nonrecharging aquifer at a rate that would leave one-third of the aquifer's current stock in storage after 40 years. 77 N.M. at 242, 421 P.2d at 774.

Commentators have criticized the prior appropriation doctrine as applied in some states because of its failure to clearly define when a junior appropriator is entitled to pump. *See, e.g.*, Corker, *Inadequacy of The Present Law to Protect, Conserve and Develop Groundwater Use*, 25 ROCKY MTN. MIN. L. INST. 23-1, 23-12, 23-13 (1979).

54. *See, e.g.*, IDAHO CODE § 42-237 (1977); NEV. REV. STAT. § 534.090 (1981); N.M. STAT. ANN. § 72-12-8 (Supp. 1982).

55. Johnson, *supra* note 15, at 1036. In 1927, New Mexico became one of the first states to enact a prior appropriation statute. *See* 1927 N.M. Laws 450 (amended 1931 N.M. Laws 229) (current version at N.M. STAT. ANN. §§ 72-12-1 to -28 (1978 & Supp. 1982)). Numerous commentators have cited New Mexico as an example of a state where groundwater resources are managed well. C. CORKER, GROUNDWATER LAW, MANAGEMENT AND ADMINISTRATION, 225-26, 340 n.17 (Nat'l Water Comm'n Legal Study No. 6, 1971); Clark, *supra* note 47, at 469-70; Note, *New Mexico's Mine Dewatering Act: The Search for Rehoboth*, 20 NAT. RESOURCES J. 653, 655-66 (1980).

statutes, the most senior appropriators have little incentive to use groundwater efficiently, because termination of their water supply is unlikely.[56] Indeed, statutes that call for forfeiture of unused groundwater rights actually discourage appropriators from undertaking conservation measures:[57] if appropriators conserve, they lose their rights to the amount of water conserved. Hence, such statutes do not ensure efficient use of groundwater.

Prior appropriation statutes that preserve existing groundwater rights raise an additional problem. They do not provide a means for alleviating pre-enactment overdraft conditions. Regulation of subsequent pumping only prevents the depletion rate from increasing. It does not eliminate depletion or even reduce the rate.[58] Thus, there are serious flaws in relying on prior appropriation statutes to control the use of groundwater.

C. *Imposing Quantitive, Need-Based Limits on All Pumpers of Groundwater*

None of the four prevailing groundwater property doctrines—absolute ownership, reasonable use, correlative rights, or prior appropriation—provides a fully satisfactory means of regulating groundwater use. The shortcomings, however, could be remedied by adopting an approach that imposes quantitative, need-based limits on all groundwater pumpers.[59]

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56. Although the doctrine against waste could be used to restrict a senior appropriator's use of groundwater, see *supra* note 31, that doctrine has not been applied to force conservation of groundwater use. *See supra* notes 34-36 and accompanying text.

57. *See, e.g.*, Pring & Tomb, *supra* note 36, at 25-20 to -22; CAL. COMM'N REPORT, *supra* note 7, at 60.

58. Many of the states that have enacted prior appropriation statutes did not have serious overdraft conditions when their statutes were enacted and therefore did not need a mechanism for decreasing pre-enactment rates of water consumption. For example, New Mexico's groundwater statute was passed in 1927, see *supra* note 55; however, substantial groundwater pumping did not begin in most of that state's groundwater basins until after World War II. *See, e.g.*, Harris, *Water Allocation Under The Appropriation Doctrine In The Lea County Underground Basin of New Mexico*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 155 (D. Haber and S.W. Bergen eds. 1958).

Oregon was another of the first states to pass a prior appropriation statute. 1927 Or. Laws 410 (current version at OR. REV. STAT. §§ 537.505 to .795 (1981)). Pumping of substantial amounts of water from Oregon's aquifers did not begin until after 1940. Note, *Rights to Underground Waters in Oregon: Past, Present and Future*, 3 WILLAMETTE L.J. 317, 318 (1965) (quoting Thirtieth Biennial Report of the State Engineer to the Governor of Oregon [1962-1964] at 20).

In Colorado, nontributary groundwater was essentially unregulated until 1957. 1957 Col. Sess. Laws 863 (repealed 1965). *See* Note, *A Survey of Colorado Water Law*, 47 DEN. L.J. 226, 312-13 (1970). Pumping of substantial quantities of groundwater, however, did not begin until the early 1960's. G. RADOSEVICH, K. NOBE, D. ALLARDICE, and C. KIRKWOOD, EVOLUTION AND ADMINISTRATION OF COLORADO WATER LAW: 1876-1976, at 114-15 (1976).

59. Another possible approach would be to use a price mechanism to encourage more efficient use of water. Numerous commentators have extolled the virtues of such an approach. *See, e.g.*, NAT'L WATER COMM'N, *supra* note 7, at 247-59. *But see* Note, *Indian Claims to Groundwater: Reserved Rights or Beneficial Interest?*, 33 STAN. L. REV. 103, 106 n.12 (1980) (noting externalities that a market system would ignore). But it is doubtful that use of markets alone could return a seriously overdrafted aquifer to a safe condition. The price elasticity of demand for water, that is, the responsiveness of demand to changes in price, varies according to type of use. *See, e.g.*, CORKER, *supra* note 55, at A1-83 n.23. For virtually all uses it is much lower than one: a one percent rise in price results in less than a one percent decline in the quantity of water used. *See, e.g.*, *id.*; NAT'L WATER COMM'N, *supra* note 7, at 252-53, 256-57; Pope, Stepp, and Lytle, *Effects of Price Change Upon the Domestic Use of Water Over Time* (Water Resources Research Institute Report No. 56, March 1975).

Because demand for water is relatively inelastic, only a steep hike in prices could reduce

Such an approach would first call for determination of the rates at which groundwater is being withdrawn from and replenished to the aquifer. Next, the implementing authority would be required to decide what rate of overdraft, if any, should be permitted. Although the determination of rates of withdrawal and recharge will present a formidable challenge,[60] the more difficult question may be deciding the optimal rate of net withdrawal.[61] Finally, the selected withdrawal rate must be divided among the groundwater users, by placing a quantitative limit on the amount of water that each user can pump.

Quotas should be set not according to past use, as under the correlative rights doctrine,[62] nor according to time of initial pumping, as under the prior appropriation doctrine,[63] but simply according to need. Need would be determined by classifying all groundwater users according to type of use, such as irrigation or domestic. All persons using water for the same purpose would be given the same quota. Thus, for example, all irrigators growing similar crops under similar conditions would be allowed to pump the same amount of water per acre.[64] Existing users would be allowed to continue

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pumping significantly; however, such an increase would be politically unacceptable. *See, e.g.*, Arizona Daily Star, Nov. 18, 1977, at 1 (raising water prices in Tucson resulted in three members of the city council being recalled). But a gradual price rise might not bring about enough conservation to save the aquifer. Furthermore, the uncertainty of the response to a price hike would make planning the depletion of the aquifer difficult.

Nonetheless, financial incentives could play an important part in any groundwater management scheme. For example, Arizona's groundwater statute provides for a pumping tax, the proceeds of which are to be used to defray administrative costs, purchase supplemental water supplies, and purchase and retire agricultural land. ARIZ. REV. STAT. ANN. § 45-611 (Supp. 1982-1983).

Recently, the U.S. Supreme Court made it clear that a state cannot attempt to solve its groundwater problems by preventing groundwater from being taken out of the state. *See* Sporhase v. Nebraska *ex rel.* Douglas, 102 S. Ct. 3456 (1982). Furthermore, as noted earlier, importation of surface water is not generally a feasible solution to overdraft. *See supra* note 42.

60. *See* CORKER, *supra* note 55, at 77, 80-81.

61. Not only is it difficult to calculate safe yield, see *supra* note 8, but safe yield may not be equivalent to the optimal withdrawal rate. Most notably, where an aquifer's rate of replenishment is zero or close to zero, see Meyers, *Federal Groundwater Rights: A Note on* Cappaert v. United States, 13 LAND & WATER L. REV. 377, 382 (1978), optimum benefits may be achieved by allowing a certain amount of overdraft, even though such use will eventually leave an area without a groundwater supply. The goal of Arizona's new statute is to return Arizona's major groundwater basins to safe yield by 2025, or 45 years after enactment of the statute. *See infra* notes 67-69 and accompanying text.

62. *See supra* notes 44-46 and accompanying text.

63. *See supra* text accompanying notes 52-53.

64. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 45-462 to -466 (Supp. 1982-1983) (providing for "irrigation grandfathered rights" and two types of "non-irrigation grandfathered rights"). *See also* Connall, *A History of the Arizona Groundwater Act*, 1982 ARIZ. ST. L.J. 313; Higdon & Thompson, *supra* note 7, at 650-51.

Under the Arizona statute, existing users who wish to change their type of use are often restricted from changing, by provisions designed to encourage conservation of groundwater generally and the retirement of land irrigated by groundwater. For example, owners of non-irrigation grandfathered rights may use their rights only for non-irrigation purposes, ARIZ. REV. STAT. ANN. §§ 45-470 to -471 (Supp. 1982-1983), and may convey them only for non-irrigation purposes. *Id.* at §§ 45-473 to -474. When an irrigation grandfathered right is changed to a non-irrigation use, the quantity of groundwater that may then be used is limited to the lesser of the amount of the irrigation grandfathered right or three acre-feet per acre per year. *Id.* at § 45-469 (average consumptive use of crops grown in central Arizona is approximately 3.6 acre-feet per acre per year, Johnson, *supra* note 15, at 1071 n.129).

their previous type of use,[65] pursuant to their pre-existing rights, but subsequent users would need a permit to engage in a particular use.[66]

This proposed approach is similar to the groundwater management plan recently adopted in Arizona.[67] For groundwater basins in areas of the state initially covered by the statute,[68] the legislature has established the goal of safe yield[69] by January 1, 2025.[70] The goal of balancing groundwater withdrawals and recharge is to be achieved primarily by imposing increasingly stringent quotas on all groundwater users.[71] Under the Arizona plan, the quotas will be established by type of use: agricultural users will be subject to an "irrigation water duty" based on "the quantity of water reasonably required to irrigate the crops historically grown," and presuming that

65. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-512 (Supp. 1982-1983) (creating six classes of permits). *See also* Connall, *supra* note 64, at 337. Some types of uses are exempt from Arizona's permit requirement. ARIZ. REV. STAT. ANN. §§ 45-491 to -498 (Supp. 1982-1983) (cities, towns, and private water companies in service areas need not obtain permits), § 45-454 (Supp. 1982-1983) (permit exemption for small domestic wells).

66. *See, e.g.*, ARIZ. REV. STAT. ANN. § 45-512 (Supp. 1982-1983).

67. *See id.* at §§ 45-401 to -637 (Supp. 1982-1983). For good summaries of the statute, see Connall, *supra* note 64, at 330-43; Higdon & Thompson, *supra* note 7, at 632-34; Johnson, *supra* note 15, at 1045-57, 1062-63 (1980); Pontius, *Groundwater Management in Arizona: A New Set of Rules*, 16 ARIZ. B.J. 28 (1980).

Before Arizona passed its new statute, groundwater use in the state was governed almost entirely by the reasonable use doctrine. *See* Connall, *supra* note 63, at 315. The only statutory control was a law that gave the State Land Department authority to delineate "critical groundwater areas." ARIZ. REV. STAT. ANN. §§ 45-301 to -324 (1956) (repealed 1980). Within these areas the law prohibited additional pumping for agricultural uses, § 45-314, but did not empower the state to restrict current pumping. The statute frequently was criticized for being inadequate to solve Arizona's groundwater mining problem. *See, e.g.*, Trelease, *supra* note 10, at 867; Clark, *Arizona Ground Water Law: The Need for Legislation*, 16 ARIZ. L. REV. 799, 818 (1974).

68. These are called the "initial active management areas." *See* ARIZ. REV. STAT. ANN. §§ 45-411, 45-563 (Supp. 1982-1983). Together they include 80% of the state's population and 69% of the state's groundwater overdraft. Johnson, *supra* note 15, at 1046 (citing the Arizona Department of Water Resources). The statute also provides mechanisms for creation of "subsequent" active management areas. *See* ARIZ. REV. STAT. ANN. §§ 45-412, 45-415 (Supp. 1982-1983).

69. The statute defines safe yield strictly in terms of the quantity of groundwater withdrawn from and recharged to the aquifer: " 'safe yield' means a groundwater management goal which attempts to achieve and thereafter maintain a long-term balance between the annual amount of groundwater withdrawn in an active management area and the annual amount of natural and artificial groundwater recharge. . . ." ARIZ. REV. STAT. ANN. § 45-561(6) (Supp. 1982-1983). This definition has been criticized as being too inflexible. Higdon & Thompson, *supra* note 7, at 638-39. *See also supra* note 8. Given that many of the undesirable results of persistent overdraft may be irreversible, see, e.g., Corker, *supra* note 53, at 23-20 to -21 (noting that once a groundwater basin is contaminated, it is likely to remain that way for decades or centuries), and given that some areas of the state rely exclusively on groundwater as their source of water, see Johnson, *supra* note 15, at 1043 (Tucson is one of the largest cities in the world relying on groundwater for all of its water supply), the statute's narrowly defined goal is perhaps the best way to manage the state's precious groundwater resources at this time.

70. ARIZ. REV. STAT. ANN. § 45-562(A) (Supp. 1982-1983). This is the goal for the Tucson, Phoenix, and Prescott active management areas. The management goal for the Pinal active management area is more flexible. *Id.* at § 45-562(B). The state water director will set the management goals for subsequent active management areas. *Id.* at § 45-569(A).

71. *See id.* at §§ 45-563 to -568. A groundwater user can obtain a variance from the conservation timetable by showing "compelling economic circumstances." *Id.* at § 45-574(C). Other means to achieve the management goal include a program for augmentation of the water supply and purchase and retirement of grandfathered rights. *See id.* at §§ 45-565(A)(4), 45-566(A)(4) and (A)(6), 45-567(A)(4) and (A)(6). The Central Arizona Project is expected to bring into the state an average of 1.2 million acre-feet per year from the Colorado River, Johnson, *supra* note 15, at 1044, not enough water to solve the state's overdraft problem. *Id.*

various conservation methods, such as lined ditches, are used.[72] Municipal users will be subject to "reasonable reductions in per capita use;"[73] and, industrial users will be required to use the "latest commercially available conservation technology consistent with reasonable economic return."[74]

The adoption of need-based quotas as exemplified in the Arizona plan would result in more effective management of groundwater than is provided by any of the current groundwater property doctrines. It would prevent the wasteful and inequitable "races to the pumphouse" encouraged by the correlative rights doctrine,[75] and unlike the prior appropriation doctrine,[76] would force all groundwater pumpers to achieve a certain degree of efficiency in their use of water. Because the proposed approach provides for quantitative adjustment of all pumping, including that by existing users, it could not only prevent overdraft from developing or worsening, but could also correct existing overdraft problems.[77]

Efficient use of water could be further encouraged by providing that pumpers who use only part of their quotas do not forfeit their rights to use full quotas.[78] Without fear of losing legal rights, pumpers could then adopt conservation measures that reduce pumping below their legal quotas.[79]

The proposed approach probably would be most effective if implemented at the state rather than the local level, because localities have shown great reluctance to impose significant restrictions on their groundwater use.[80] Furthermore, state control would facilitate conjunctive management of groundwater and surface water supplies.[81] The Arizona statute described above provides for local participation in the management process, with final

72. ARIZ. REV. STAT. ANN. §§ 45-564(A)(1), 45-565(A)(1), 45-566(A)(1) (Supp. 1982-1983).

73. *Id.* at §§ 45-564(A)(2), 45-565(A)(2), 45-566(A)(2).

74. *Id.*

75. *See supra* text accompanying notes 44-46.

76. *See supra* text accompanying note 56.

77. *Cf. supra* text accompanying note 58 (prior appropriation statutes that preserve existing groundwater rights are inadequate to correct pre-enactment overdraft conditions).

The goal of the Arizona statute is to return major overdrafted groundwater basins initially covered by the act to a condition of safe yield 45 years after the statute was enacted. *See supra* notes 68-70 and accompanying text.

78. Pumpers who discontinue particular types of use, however, could be held to have forfeited their right to engage in the discontinued activity. *See supra* note 63.

79. *Cf. supra* text accompanying note 57 (forfeiture rule discourages adoption of conservation measures). The Arizona groundwater statute permits farmers to "bank" groundwater for future use if they use less than the amount permitted by their water duty. ARIZ. REV. STAT. ANN. § 45-467 (Supp. 1982-1983).

80. *See, e.g.*, Johnson, *supra* note 15, at 1047-49; Smith, *The Valley Water Suit and Its Impact on Texas Water Policy: Some Practical Advice for the Future*, 8 TEX. TECH. L. REV. 577, 634-35 (1977); Comment, *Ground Water Management: A Proposal for Texas*, 51 TEX. L. REV. 289, 297-98 (1973).

81. A state management body would have more incentive than a local authority to manage state groundwater and surface water with a goal of conservation, because it probably would not be dominated by local concerns of preserving the status quo. *See supra* note 79. Furthermore, because state control would mean that all state water supplies would be considered in making any management decision, a state body would be in a better position than a local authority to manage state groundwater and surface water supplies conjunctively. *See* Comment, *Texas Underground Water Law: The Need for Conservation and Protection of a Limited Resource*, 11 TEX. TECH. L. REV. 637, 652 (1980).

decisions being made by the State Water Director.[82] Although Nebraska has also shown support for mandatory conservation of groundwater use, it has adopted a statute that gives localities authority to impose such controls.[83] These statutory restrictions raise the question of whether it is constitutional to require existing groundwater users to reduce their pumping.[84]

II. THE CONSTITUTIONAL BARRIER TO A MANDATORY CONSERVATION PLAN—IMPAIRMENT OF "VESTED RIGHTS"

The constitutionality of quantitative, need-based limits is most likely to be challenged under the takings clause of the fifth amendment,[85] which provides that if the government takes private property for public use, it must

82. *See* Connall, *supra* note 64, at 333. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 45-103(B) (Supp. 1982-83) (granting director broad authority), and §§ 45-418 to -421 (Supp. 1982-83) (establishing an area director and a groundwater users advisory council for each active management area).

83. In 1975, Nebraska, a common law state, enacted the Nebraska Ground Water Management Act, NEB. REV. STAT. §§ 46-656 to -674 (1978 & Supp. 1982). This statute provides that the State Director of Water Resources, upon local initiative, may designate control areas where there is "[a]n inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply . . . ." *Id.* at § 46-658(1)(a)(i) (Supp. 1982). Once this designation has been made, the local district "shall" adopt one or more of the following controls: *mandatory conservation for all current users*, rotation of wells, well-spacing, installation of meters, and "such other reasonable regulations as are necessary to carry out the intent of this act." *Id.* at § 46-666(1)(a) to (e) (emphasis added). As of July 1, 1979, five control hearings had been held, three areas had been designated control areas, two of these had established controls, and only one had firmly decided to impose quantitative limits on groundwater withdrawal. Aiken & Supalla, *supra* note 8, at 628-29, 640-41.

84. The issue could also arise under several other statutes, depending on how those statutes were applied and interpreted. *See* COLO. REV. STAT. § 37-90-109 (1973 & Supp. 1982) (imposing prior appropriation system on existing, as well as subsequent users); *id.* at § 37-90-137(4) ("We believe that the Colorado legislature in enacting the 1965 Act and adding section 37-90-137(4) exercised the power—long recognized but previously virtually dormant—to legislate concerning nontributary waters. . . . We recognize, however, that many landowners may have come to rely on wells tapping non-tributary sources based on local custom, well permits, and judicial decrees. We express no opinion on the scope of those rights or the extent to which the 1965 Act, including section 37-90-137(4), can be applied to limit them." State of Colo. v. Southwestern Colo. Water Conservation Dist., Civ. Action No. 79SA38 (Colo. 1983)); MONT. CODE ANN. § 85-2-507(4)(d) (1981) (in "controlled groundwater areas," board of natural resources can "reduc[e] the permissible withdrawal of groundwater by any appropriator"); OR. REV. STAT. § 537.735(4)(d) (1981) (in "critical groundwater areas," Water Resources Director can "reduc[e] the permissible withdrawal of groundwater by any one or more appropriators"); S.D. COMP. LAWS ANN. § 46-6-6.2 (Supp. 1982) (where groundwater shortage exists, water management board shall reduce equally the permissible output of all large capacity wells).

85. Other questions that a court might face are whether the conservation criteria are reasonably related to the goal of preserving the water supply, and whether they are being applied fairly to all groundwater users.

The conservation criteria must be reasonably related to the goal of the management plan, whether it be planned depletion or safe yield. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Bushnell v. Sapp, 194 Colo. 273, 279-80, 571 P.2d 1100, 1104 (1977); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 228, 284 N.E.2d 891, 896 (1972). This prevents the government from using the criteria arbitrarily.

Furthermore, no group of groundwater users should be required to make a disproportionate sacrifice nor should the conservation criteria be used to redistribute groundwater from one group of users to another. Although the courts give the legislature great deference to classify in the exercise of the police power, *see, e.g.,* Continental Baking Co. v. Woodring, 286 U.S. 352, 370-71 (1932); *In re* Spring Valley Dev., 300 A.2d 736, 752-54 (Me. 1973), that power may not be used to favor one group of citizens over another. *See, e.g.*, Hale v. City and County of Denver,

justly compensate the owner.[86] Existing users would contend that a forced reduction in pumping without compensation constitutes an illegal taking of their private property right to pump groundwater, a right that has been vested in them by the common law or by statute. They would focus on the lack of compensation rather than challenge the authority of the state, because there is little question that, if compensation were afforded, need-based quotas would qualify as a public use restriction and thus would be upheld as a constitutional exercise of state police power.[87]

Precedential support for such a challenge appears in cases that have tested the constitutionality of other statutory restrictions on groundwater use, particularly laws replacing common law systems with prior appropriation systems. These decisions have upheld restrictions on common law rights to pump groundwater,[88] but have stressed that the restrictions applied only

159 Colo. 341, 346, 411 P.2d 332, 335 (1966); State v. Lee, 356 So. 2d 276, 279-82 (Fla. 1978); Liquor Store v. Continental Distilling Corp., 40 So. 2d 371, 388 (Fla. 1949).

86. U.S. CONST. amend. V, § 1. The takings clause of the fifth amendment applies to the states through the fourteenth amendment. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 326 (1897). Numerous state constitutions provide that compensation must be paid when property is either taken *or* damaged. *See, e.g.*, CAL. CONST. art. 1, § 19. For a list of these state constitutional provisions, see Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1439 n.3 (1974). The California Supreme Court has suggested that these provisions expand the range of governmental action requiring compensation. *See* Bacich v. Board of Control, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943). This article will analyze only the interpretation given to the Just Compensation Clause of the U.S. Constitution.

Rights to pump oil and gas have, however, been more extensively regulated than rights to pump groundwater. *See* H. WILLIAMS, R. MAXWELL & C. MEYERS, CASES AND MATERIALS ON THE LAW OF OIL AND GAS 13-19 (1964). Extensive regulation of oil and gas pumping has been upheld as a valid exercise of the police power. *See, e.g.*, Champlain Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932); Woody v. State Corp. Comm'n, 265 P.2d 1102 (Okla. 1954). Given the absence of such an activist history in the regulation of rights to pump groundwater, it would be incorrect to argue that, simply based on precedent from the regulation of oil and gas pumping, greater restrictions on groundwater pumping should be upheld as a constitutional exercise of the police power. In the latter case, property owners expectations would be significantly altered, suggesting that compensation would be required. *See infra* note 115.

87. "The role of the judiciary in determining whether [the power of eminent domain] is being exercised for a public purpose is an extremely narrow one." Berman v. Parker, 348 U.S. 26, 32 (1954). Courts uphold, as valid exercises of the police power, many laws that restrict private property to protect the environment. *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Callopy v. Wildlife Comm'n, 625 P.2d 994 (Colo. 1981); Morshead v. California Regional Water Quality Control Bd., 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975); State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906, *aff'd per curiam*, 338 U.S. 863 (1949); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1922). Moreover, in upholding a state law restricting use of river water, the Supreme Court stated that "[f]ew public interests are more obvious, indisputable and independent of particular theory" than the public interest in preserving the water supply in its rivers. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908). That statement carries strong implications for laws designed to preserve groundwater supplies. Most importantly, courts have explicitly recognized the power of states to impose restrictions for purposes of protecting groundwater supplies. *See, e.g.*, Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 83, 638 P.2d 1324, 1329 (1981), *appeal dismissed*, 457 U.S. 1101 (1982); Southwest Eng'g Co. v. Ernst, 79 Ariz. 403, 409, 291 P.2d 764, 768 (1955). Thus, courts are unlikely to hold that a law imposing need-based quotas fails to meet the public use requirement for state restrictions on private property. Nevertheless, a groundwater regulation statute enacted for a legitimate public purpose may not unduly burden interstate commerce. *See* Sporhase v. Nebraska *ex rel.* Douglas, 102 S. Ct. 3456, 3463-67 (1982).

88. *See, e.g.*, F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 630 P.2d 1164 (1981); Williams v. City of Wichita, 190 Kan. 317, 374 P.2d 578 (1962), *appeal dismissed*, 375 U.S. 7 (1963);

to unexercised rights to pump.[89] Several cases clearly indicate that impairment of exercised pumping rights would require compensation.[90]

For example, in *Baeth v. Hoisveen*,[91] plaintiffs were granted a permit by the State Water Commission to pump 200 gallons per minute. Plaintiffs had applied for a right to pump 900 gallons per minute, and challenged the constitutionality of the statute which gave the state the power to limit their pumping. In deciding that the statute was constitutional, the court reasoned that, had the plaintiffs been pumping groundwater at the time the statute was enacted, they would have acquired a "vested right" to the amount they were then applying to a beneficial use, and the state could not have retroactively limited their pumping without providing compensation.[92] This article argues, however, that requiring existing users to conform to quantitative,

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Baumann v. Smrha, 145 F. Supp. 617 (D. Kan.), *aff'd per curiam*, 352 U.S. 863 (1956); Baeth v. Hoisveen, 157 N.W.2d 728 (N.D. 1968).

89. *See, e.g.*, F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 229, 232, 630 P.2d 1164, 1169, 1171 (1981); Williams v. City of Wichita, 190 Kan. 317, 334-35, 374 P.2d 578, 591 (1962), *appeal dismissed*, 375 U.S. 7 (1963); Baeth v. Hoisveen, 157 N.W.2d 728, 733 (N.D. 1968).

90. *See, e.g.*, Baumann v. Smrha, 145 F. Supp. at 624-25 (in enacting statutes regulating groundwater use, state must recognize and afford protection to exercised pumping rights), *aff'd per curiam*, 352 U.S. 863 (1956); Undlin v. City of Surrey, 262 N.W.2d 742, 746 (N.D. 1978) (holding that if city had interfered with plaintiff's exercised pumping right, city must compensate plaintiff). Commentators have also recognized the possibility of drawing a distinction between impairment of exercised water rights and impairment of unexercised water rights. *See* Beck & Hart, *The Nature And Extent Of Rights In Water In North Dakota*, 51 N.D.L. REV. 249, 260-64 (1974); Larson, *The Development of Water Rights and Suggested Improvements in the Water Law of North Dakota*, 38 N.D.L. REV. 243, 254-56, 269-70 (1962); O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549, 606-09 (1962).

Although some decisions suggest that the state has broad police power to regulate groundwater, see, e.g., Southwest Eng'g Co. v. Ernst, 79 Ariz. 403, 409, 291 P.2d 764, 768 (1955); Town of Chino Valley v. Prescott, 131 Ariz. 78, 83, 638 P.2d 1324, 1329 (1981), none of these decisions endorsed state action depriving a groundwater user of the quantity of water that he was pumping at the time that the state imposed additional restrictions. In *Southwest Eng'g Co.*, the Arizona Supreme Court considered the constitutionality of Arizona's 1948 "critical groundwater area" legislation, which altered the reasonable use rule by prohibiting any additional pumping in designated areas. Although the court endorsed a broad use of the police power, it emphasized the importance of protecting the rights of existing users.

In Friendswood Dev. v. Smith-Southwest Indus., 576 S.W.2d 21 (Tex. 1978), the issue was whether land subsidence caused by groundwater pumping was actionable in tort. The court held that groundwater users pumping under the absolute ownership rule would not be liable for subsidence of their neighbors' land since the users' rights to take groundwater were an established rule of property. The court, however, pursuant to legislative act or policy, could limit future groundwater withdrawals if the pumping was performed so negligently that it caused land subsidence.

In *Chino Valley*, the Arizona Supreme Court was called upon to rule on the constitutionality of Arizona's 1980 groundwater legislation insofar as it limited a user's right, under the reasonable use rule, to enjoin a neighbor from using groundwater away from the overlying land. The court held that the Act did not unconstitutionally infringe upon the plaintiff's right to protect its groundwater by preventing non-overlying uses, because the plaintiff possessed only a usufructuary right and did not own the groundwater. Although the court declared that the state's power to regulate groundwater is broad, it was careful to limit its decision to the facts. The decision did not restrict the quantity of groundwater that the plaintiff was pumping. Rather, the court based its decision on two previously recognized principles. First, the court emphasized that, under the reasonable use rule, the plaintiff did not own the groundwater beneath his land. Second, the court held that the state could change one of the plaintiff's rights under the reasonable use rule, the right to prevent non-overlying uses, a right which had not been of much value in the past. *See supra* note 33.

91. 157 N.W.2d 728 (N.D. 1968).

92. *Id.* at 733.

need-based pumping limits does not constitute a taking of property and thus does not require compensation. Both a theory of public rights and a more traditional takings approach support this conclusion.

A. *Public Rights Theory*

It has proved difficult to develop coherent guidelines for determining when government restrictions on private property constitute a compensable taking.[93] Professor Sax has suggested that the problem is best conceptualized by recognizing that one individual's property use often affects other individuals' property uses.[94] The "public rights" of owners holding diffuse interests should be accorded the same protection as the property right of an individual.[95]

For example, a factory owner who uses his property for activities that release pollutants into the air affects the availability of clean air to other parcels of property. Conversely, an individual who insists on being able to breathe unpolluted air affects the factory owner's ability to use his property for activities that release pollutants into the air.[96] Each activity has a spillover effect. Whereas releasing pollutants imposes a burden on a wide segment of the population, insisting on being able to breathe unpolluted air imposes a burden on a single property owner.

When the government permits the factory owner to release pollutants, the government is not required to compensate the public for the resulting decline in air quality. Similarly, under public rights theory, as propounded by Professor Sax, the government should not be required to compensate the factory owner when the government restricts the release of pollutants to safeguard the public interest in breathing clean air.[97] The theory thus permits the government to vindicate either of the two conflicting rights—the factory

93. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 (1971). *See also* Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 105-06 (1962).

94. Sax, *supra* note 93, at 152.

95. *See infra* note 97. Professor Sax explains that neither nuisance law nor the public trust doctrine is capable of protecting "public rights" as he defines them. *See* Sax, *supra* note 93, at 155 n.16. Private nuisance law is inadequate because it is available only when the individual claimant suffers substantial, particularized harm, not shared by the public. W. PROSSER, TORTS § 88, 585-87 (4th ed. 1971). Although nuisance law protects some public rights, public nuisance law is inadequate because it depends on community representatives deciding that a particular case offends the public, *id.*, and, in Sax's view, this decision is often weighed heavily in favor of private property rights. Sax, *supra* note 93, at 155 n.16. The public trust doctrine is incapable of protecting public rights because its protection is limited to property owned by a public body. *See id.*

96. *See* Sax, *supra* note 93, at 162.

97. *See id.* at 162. Thus, central to the theory is the belief that courts should accord diffusely held interests the same level of protection as they accord interests that are not diffusely held. *See id.* at 159-60. Sax illustrates this point with a wetlands example. Because marine life that breeds along the wetlands shorelines requires maintenance of the shoreline to survive, the wetlands owner who wants to develop his tract demands that ocean users tolerate a change in their use of the ocean. Ocean users, on the other hand, demand that the wetlands owner restrict the use of his land. Traditional takings law may hold that a restriction on the wetlands owner's ability to develop his land is a taking of property for which the public must compensate the landowner. The public rights critique, however, questions why, if the wetlands owner's activi-

owner's right to use his property for polluting activities and the public's right to breathe clean air—without affording compensation.[98]

The theory does not, however, hold that whenever the government regulates or infringes a private interest in the name of public welfare, the government need not compensate the owner of the infringed right.[99] When the government restricts an activity to alleviate spillover effects, it is not required to compensate, because it is merely vindicating a pre-existing public right.[100] But when the government restricts an activity that has no such spillover effects, it is acquiring something to which it was not previously entitled, and it must therefore pay for what it has obtained.[101]

Groundwater pumping is an activity that can have significant spillover effects.[102] Just as the public has a right to clean air, it has a right to protect groundwater supplies. In the past, the public did not overtly assert its right because water appeared to be plentiful and overdraft problems were either unknown, not significant enough to cause alarm, or ignored. Consequently, landowners freely pumped groundwater within the confines of rules designed to mediate disputes among individual users rather than disputes between individual users and the public as a whole.[103] Now that overdraft is widespread and poses a significant threat to the adequacy of water supplies,[104] the public must assert its dormant right to protect groundwater supplies.

In some regions, the problem of overdraft has become such a serious

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ties impose restrictions on the use of the ocean, "the wetlands owner ought not be compelled to buy *that* right." *Id.* at 160 (emphasis in original).

By ignoring the cumulative right, each person having an interest in the use of the ocean is treated not as a legitimate interest holder but as an interloper, and is forced to pay for the protection of his interest. This result is the consequence of our traditional inability to recognize public rights; i.e., our inability to see that claims of rights to use resources ought not to be discriminated against simply because they are held in one, rather than another, conventional form of ownership. *Id.*

98. *See id.* at 163.

99. *Id.* at 161.

100. *See id.* at 155-61.

101. *See id.* at 164-66. Using an airport and a neighboring farmer as an example, if the airport wants to construct a tall building, it will obstruct the farmer's sunlight. If the farmer asserts a right to quiet, it will interfere with the airport's ability to operate. No matter how these conflicts are resolved, the government should not be required to compensate, because the rights asserted by each party have spillover effects. If, however, the airport wants to take part of the farmer's land to build another runway, thus infringing the farmer's right to his land, the situation is different. Compensation is due, because the right asserted by the farmer affects the airport's ability to undertake a use beyond its domain. *Id.*

102. *See supra* text accompanying notes 10-14.

103. *See, e.g.*, State *ex rel.* Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440, 447 (1949). Speaking of the recently enacted statute regulating surface water and groundwater, the court said: "Heretofore we have approached the questions [of water rights] largely on the basis of individual interest alone. Under this declaration and other provisions of the act we now approach them upon the basis of the interest of the people of the state . . . ." See also the descriptions of the reasonable use, correlative rights, and appropriation doctrines at text accompanying notes 25-57. The right to pump groundwater is defined primarily according to what other groundwater users are doing and not according to an overall management scheme.

Under the appropriation doctrine, the standard usually employed to determine whether a permit to pump should be granted is whether existing groundwater uses will be impaired. *See, e.g.*, COLO. REV. STAT. §§ 37-90-107(3) to -107(4) (1973 & Supp. 1982) (regulating groundwater pumped from "designated" groundwater basins).

104. *See supra* text accompanying notes 6-9.

threat that the state must require landowners to pump less water than they are presently taking.[105] Under public rights theory, the introduction of such limits should not require compensation, because the government is simply regulating the spillover effects of groundwater pumping.[106]

To hold otherwise would be to assume that currently exercised private interests enjoy a special status *vis-a-vis* a previously existing but unasserted public interest.[107] Such a position defines rights according to what the status quo presently recognizes, rather than according to some other notion that may be more just. Recognizing rights and defining fairness solely according to expectations developed from previously acceptable practices is dangerous because it shelters the status quo from the normal process of legislative change without questioning whether existing expectations make some larger normative sense.[108] When individual and public interests collide, an individual claiming a private right should not necessarily be preferred simply because he has been exercising his right while the public has not been asserting its right.[109]

Although courts have never formally adopted a public rights takings

105. This is what has happened in Arizona. *See supra* notes 67-74 and accompanying text.

106. Even if the government regulates water from an overdrafted basin in an area where the general public has an adequate alternative source of water, the state's conservation requirements should not constitute a taking. In such a case, the government is not regulating private property for the purpose of directly enhancing the public resource base; rather, the government is essentially arbitrating private property owners' competing claims to a common pool. When the government acts to resolve conflict among private property owners, the regulation should not constitute a taking, because the government is not expropriating private property for its own benefits. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61-64 (1964). Although Professor Sax later disowned the view expressed in 1964, see Sax, *supra* note 93, at 150 n.5, under his later view no compensation would be required in the above situation because the government would be regulating spillover effects. *See supra* notes 99-101 and accompanying text.

107. Assuming the continued vitality of the cases allowing uncompensated restrictions on unexercised pumping rights, see *supra* notes 88-92 and accompanying text, to require compensation would be to hold that currently exercised water rights enjoy special status compared to currently unexercised water rights. Legal commentary has explicitly questioned the wisdom of attaching constitutional significance to whether a water right is presently being invoked. *See* O'Connell, *supra* note 90, at 608-09.

108. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 105 (1977). *See also* Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 74-75 (1977). The Supreme Court has recognized that the scope of the police power (and hence the scope of individuals' private property rights) may expand or contract as living conditions change. Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926). Indeed, the Supreme Court has recognized that a state's interest in and power to protect the water in its rivers may increase as its population and the demand for water increase. Hudson County Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

To question the degree of protection that should be given to expectations developed from previously acceptable practices does not mean that such expectations should not be given great weight when attempting to determine the permissible extent of the government's power to regulate the interests of individual property owners. See, e.g., discussion of Michelman's utilitarian takings theory, at note 115 *infra*.

109. *See* Sax, *supra* note 93, at 157-58. Professor Sax illustrates with the following example:

> If two property owners have adjoining tracts, one of which has traditionally absorbed drainage water, the upper owner is not necessarily entitled to drain that water to the lower land. Analogously, one should be prepared to recognize a public interest in flood control *equal in stature* to the private property owner's interests. In this way, the conflict can be resolved so as to maximize net benefits from the resource network in question, and either claimant might constitutionally be required to yield without receiving compensation.

Id. (emphasis added).

theory as described above, they have held in specific cases that the public interest may be weighed against a landowner's currently exercised interest, and that the public interest may demand that the landowner's interest be restricted without compensation. An example is *State v. Dexter*,[110] where a state statute restricted logging activity by requiring owners of forested land to leave a certain number of trees standing for reseeding and restocking purposes. In *Dexter*, the Washington Supreme Court held, and the United States Supreme Court affirmed, that the statute did not constitute a taking requiring compensation.[111] The court explained that if the landowners were allowed to continue their unrestricted logging efforts, it would create a danger of floods and soil erosion, as well as eventually lead to destruction of the forested lands in the state, thereby destroying a permanent source of employment for the state's citizens and endangering the state's economic standing.[112] The court based its holding on the premise that private enterprise must use its property in ways that are consistent with the public welfare.[113]

By the same reasoning, when a state attempts to save its water supply from the consequences of overdraft by enacting a statute that requires groundwater users to reduce their current pumping, the statute should not constitute a taking requiring compensation. Like owners of forested land, owners of land overlying an aquifer must use their land in ways consistent with the public welfare. The government should therefore be allowed to restrict pumping that contributes to groundwater overdraft, which endangers a permanent source of the region's water supply.

While a theory of public rights may be appealing, particularly to conservationists, because it accords equal treatment to privately and diffusely held interests, it arguably underemphasizes a central premise of the just compensation requirement, that the government's ability to single out particular citizens' rights for sacrifice to the general welfare should be limited.[114] This "flaw" in a pure theory of public rights is not fatal to the conclusion that restrictions on groundwater pumping do not constitute a taking requiring compensation. Even if one rejects the public rights theory, and asserts that whenever state regulation severely burdens a few the public must compensate them for their losses, the imposition of mandatory conservation requirements survives takings analysis.

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110. 32 Wash. 2d 551, 202 P.2d 906, *aff'd per curiam*, 338 U.S. 863 (1949).

111. *Id.* at 559-60, 202 P.2d at 910.

112. *Id.* at 553-55, 202 P.2d at 908.

113. *Id.* at 555, 202 P.2d at 908. In Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978), the Supreme Court also appeared, at least implicitly, to recognize the potential importance that "public rights" may have in a takings analysis. Emphasizing the social value of historic preservation, *id.* at 107-09, the Court held that no compensable taking occurred when enforcement of the New York City Landmarks Preservation Law prevented the owners of Grand Central Station from constructing an office building in the air space above the station, even though the proposed building met all zoning requirements.

114. For cases stating this premise, see Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-4 at 463 (1978).

B. *Traditional Takings Analysis*

There are a number of different taking theories, and it can be argued that noncompensatory conservation requirements are constitutional under any of the prominent ones.[115] This discussion, however, is limited to the diminution in value theory, which is the model most predominantly in use

115. Prominent takings theories not discussed in the text include the physical invasion theory, the noxious use theory, the social balancing theory, and Professor Michelman's utilitarian theory. The physical invasion theory states that the government may not physically invade private property without compensating the property owner. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946); Mugler v. Kansas, 123 U.S. 623 (1887); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871). Some commentators have criticized the theory as being underinclusive and overinclusive, see, e.g., Michelman, *Property, Utility and Fairness: Comments On The Ethical Foundations Of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1226-28 (1967), but others have praised it as being fair, efficient, supported by history, and predictable. Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447, 1464-67 (1980). Under this theory, noncompensatory conservation requirements do not constitute a taking because limitations on the usufructuary right to pump groundwater, a right that is of uncertain duration and value in an overdrafted aquifer, are not as offensive as an actual invasion of one's territory, Michelman, *supra*, at 1228, such as, the purposeful flooding of property. *See* Pumpelly v. Green Bay Co., 80 U.S. 166 (1871); *but cf.* Note, *Water Use Regulation in Colorado: The Constitutional Limitations*, 49 U. COLO. L. REV. 493, 502-03 (1978).

The noxious use theory focuses on the degree to which regulated uses of property are compatible with community welfare. *See* Berger, *A Policy Analysis Of The Taking Problem*, 49 N.Y.U. L. REV. 165, 172-75 (1974); Sax, *Takings and The Police Power*, 74 YALE L.J. 36, 48-50 (1964). If a use is deemed noxious, wrongful, or harmful to the public, the government may validly regulate it without compensating for any resultant decrease in value. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915). The theory differs from public rights theory in that when uses conflict, as when one property owner wants to pollute and another wants clean air, it identifies one of the two parties as the harm-causer and the other as the innocent victim, and it subjects only the harm-causer to noncompensatory regulation. *See, e.g.*, Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 48-50 (1964). Commentators have criticized the theory because the concept of harm creation is manipulable. *See, e.g.*, *id.*; Michelman, *supra*, at 1196-1200. Just as the brickyard owner in *Hadacheck* was identified as the harm-causer because his activities impaired air quality, so too can groundwater users be identified as harm-causers because their activities threaten water supplies.

The social balancing theory weighs society's gains from a regulation against the private losses it causes. If the gains exceed the losses, no taking has occurred and no compensation need be paid. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (dictum). *See also* Michelman, *supra*, at 1193-94. Although the right to pump groundwater in an overdrafted basin would suffer little or no decline in value when it was subjected to a management plan requiring conservation, *see infra* text accompanying notes 119-130, the gains to society from preventing impairment of the water supply would be enormous, especially where most of the water supply is obtained from beneath the surface.

The utilitarian theory proposed by Michelman performs the social balancing analysis more systematically. Michelman, *supra*, at 1208-18. Professor Michelman's theory weighs the gains to society from regulation, efficiency gains, against productivity losses due to regulated parties' upset expectations, demoralization costs, and states that regulation should not be undertaken unless the efficiency gains exceed the demoralization costs. *Id.* at 1215. The theory also considers the costs of locating and compensating those persons burdened by regulation, settlement costs, and argues that compensation should be paid only when the settlement costs are lower than the demoralization costs. *Id.*

Although difficult to measure, the efficiency gains from enacting a management plan quantifying rights in an overdrafted basin would be significant. The transaction costs associated with obtaining or disposing of water rights would be lower than under many current systems because each right would represent a specific quantity of water available over a certain time span. In such circumstances, an efficient market for water rights could evolve, making it easier to buy and sell water rights. With a more predictable supply, investment would increase. The investment would be an indicator of the future value of water, a value that would be so speculative as to discourage further investment until rights were adequately quantified through mandatory conservation limits. Pumping costs would stabilize once overdraft was reduced or

today,[116] and which best illuminates the purpose of the just compensation clause of protecting against unfairly burdening those being regulated.

Under the diminution in value theory, determining whether the government has taken a property right requires assessment of the extent to which the government's action has diminished the property's market value.[117] Courts generally require a total or near total economic loss.[118] Where an aquifer is seriously overdrafted, enactment of a management plan that restricts pumping will not cause such economic loss.

Groundwater overdraft can impose costly burdens on those who pump groundwater. In addition to higher costs of pumping from a lower water table,[119] contamination and limited storage capacity pose serious problems.[120] Overdraft can lead to subsidence of land, which may result in the cracking of buildings, collapse of well casings, increased flood hazards, damage to roads and underground pipelines, and other expensive destruction.[121] Where groundwater overdraft is causing or is about to cause these

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eliminated. Finally, the social resource base would be enhanced by obtaining an aquifer with a stable supply of clean water.

The short-term demoralization costs from upsetting the existing groundwater property scheme probably would vary inversely with the severity of the overdraft problem. Where a serious overdraft problem existed, user expectations might not be seriously upset by imposition of quotas. Given the severe consequences of allowing uncontrolled depletion to continue, groundwater users may be expecting some government intervention. ("Water users have long been on notice that the [s]tate would at some point have to intervene to regulate prospective uses of a dwindling resource in face of increased use." Cherry v. Steiner, 543 F. Supp. 1270, 1280 (D. Ariz. 1982).) Furthermore, any demoralization costs would be exceeded by the "moralization gains" accruing over the long run. Existing users forced to curtail their pumping would use their water more productively in the future because they would have a dependable supply. Thus, the net demoralization costs of enacting a groundwater management plan requiring conservation would be low, while the efficiency gains would be high, suggesting that such a plan should be implemented.

Settlement costs would vary directly with the alleged demoralization costs. Where the overdraft problem was serious and there was no history or expectation of government intervention, conservation requirements would have to be especially intrusive on existing rights, resulting in high demoralization costs and high settlement costs. If the groundwater supply were saved, however, the long-term moralization gains would be significant. Given the low net demoralization costs, compensation would not be required.

116. Sax, *supra* note 93, at 152 n.8. The diminution in value theory made its debut in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). For more recent examples of its use, see Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 294-97 (1981); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 83-85 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 178-79 (1979).

117. *See, e.g.*, Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Many commentators have urged that this factor alone should not determine whether a taking has occurred. *See, e.g.*, Michelman, *supra* note 115, at 1191-93; Note, *Water Use Regulation in Colorado: The Constitutional Limitations*, *supra* note 115, at 493-94. They agree, however, that the diminution in value of private property caused by regulation is an important factor to consider when attempting to resolve the takings issue. *See, e.g.*, Michelman, *supra* note 115, at 1191.

118. *See, e.g.* Hadacheck v. Sebastian, 239 U.S. 394 (1915); L. TRIBE, *supra* note 113, § 9-3 at 460 n.3; Sax, *supra* note 92, at 151 n.7, and 152 n.8.

119. *See supra* note 13 and accompanying text.

120. *See supra* notes 13-14 and accompanying text.

121. *See, e.g.*, Bouwer, *Land Subsidence and Cracking Due to Groundwater Depletion*, 15 GROUND WATER 358, 358 (1977); R. FREEZE & J. CHERRY, *supra* note 1, at 370; W. HAMBLIN, *supra* note 1, at 228. Furthermore, the decrease in availability of groundwater and surface water caused by sustained overdraft, *see supra* notes 10-12 and accompanying text, means that water may be unavailable to protect life or property in an emergency. *See* HAMBLIN, *supra* note 1, at 225.

problems, control of overdraft through pumping restrictions may yield a net economic benefit to those who are forced to reduce their pumping.

Even where overdraft is not creating such hazards, the introduction of need-based quotas may result in economic gains for groundwater pumpers in overdrafted aquifers. While common law groundwater systems entitle users to pump large amounts of water, they do not provide users with much certainty that water supplies will remain available at nonnegligible levels. Under the absolute ownership and reasonable use doctrines, groundwater users have an essentially unrestricted right to pump, but they have little control over the quantity of water other users will pump.[122] Thus, their water supply is indefinite: they face the prospect of overdraft leading to steadily increasing pumping costs and depletion of their aquifer at an uncertain time in the future.[123] Under the correlative rights doctrine, groundwater users in unadjudicated basins also have undependable water supplies. They bear the risk that litigation costs or delays[124] may prevent final adjudication of their groundwater rights. If their basin is adjudicated, they bear the risk that their share size will be miniscule.[125] Prior appropriation statutes that preserve common law groundwater rights at overdraft levels[126] incorporate the indefinite nature of the common law rights.[127]

Under any of these groundwater doctrines, property values in overdrafted basins will be negatively affected both by the serious threat that groundwater will become unavailable, and by the uncertainty of when groundwater will be available.[128] For many groundwater users, a right to an annual quantity of water that is certain to be available both now and for many years in the future may be preferable to, and more valuable than, a right to a larger but less secure annual quantity of water.[129] Thus, control of overdraft through the use of need-based quotas, which gives groundwater users secure water supplies,[130] may yield economic benefits to existing groundwater users even when overdraft is not causing harmful side effects such as land subsidence.

Not all groundwater users, however, will regard pumping restrictions as

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122. *See supra* text accompanying notes 16-36.

123. *See supra* note 10 and accompanying text.

124. Krieger & Banks, *supra* note 42, at 66; Trelease, *supra* note 10, at 867-68.

125. *See supra* notes 44-46 and accompanying text.

126. *See supra* text accompanying notes 49, 58.

127. Prior appropriation statutes that do not preserve such common law pumping rights result in less uncertainty, particularly for the most senior appropriators. *See supra* text accompanying notes 52-53.

128. The assertion that most investors are risk-averse, and therefore demand a higher return before they will invest in riskier projects, is generally accepted in the financial community. *See, e.g.*, R. BREARLY & S. MEYERS, PRINCIPLES OF CORPORATE FINANCE 141 (1981).

129. Economic analyses of groundwater pumping in the high plains of Texas and Oklahoma have shown that restrictions on groundwater withdrawals would result in higher farm income than if groundwater pumping continued unrestricted. Aiken, *The National Water Policy Review and Western Water Rights Law Reform; An Overview*, 59 NEB. L. REV. 327, 334 (1980) (citing H. Mapp & V. Eidman, An Economic Analysis of Regulating Water Use in the Central Ogallala Formation 58-63 (Okla. Stat. Univ. Tech. Bull. No. T-141, 1976)).

130. Users know what quantity of water they can pump and how long their supply will last. *See supra* text accompanying notes 59-83. Of course, control of overdraft does not elminate the uncertainty of the availability of water caused by weather conditions.

economically beneficial. For some, the decrease in property value attributable to a reduction in the permissible pumping level may not be outweighed by the increase attributable to the enhanced certainty of future groundwater supplies. In such cases, the reduction in value will not be extreme enough to constitute a taking under the diminution in value theory, because the groundwater user will retain a right to a dependable supply of a specific quantity of water. So long as that quantity of water is nonnegligible, which it would be when the state imposes quotas that are designed to allow existing uses to continue under conservation conditions, the right will not be valueless and the groundwater user will not suffer the total or near total economic loss that is required by the diminution in value theory.[131]

CONCLUSION

Groundwater overdraft is a serious problem in many parts of the United States. Prevailing groundwater property systems do not deal with the problem satisfactorily: the absolute ownership and reasonable use doctrines provide no means of controlling overdraft; the correlative rights doctrine may lead to wasteful and inequitable "races to the pumphouse"; the prior appropriation doctrine provides inadequate incentives for efficient water use, and, if common law pumping rights are preserved, provides no means of correcting preexisting overdraft problems. The drawbacks in these systems can be overcome by determining the rate at which water can be safely withdrawn from an overdrafted aquifer, and then using need-based quotas to achieve that depletion rate.

Although the introduction of such an approach would force existing groundwater users to reduce their pumping, it would not constitute a taking requiring compensation. All prominent takings theories support this conclusion, but two are of particular note: the public rights theory, which is attractive from a policy perspective, and the diminution in value theory, which is the approach most widely used today. The public rights theory holds that when uses of property have mutually incompatible spillover effects, the government can restrict either use without affording compensation. Because groundwater pumping is an activity with serious spillover effects, mandatory limits on pumping would be constitutional under this theory.

Under the diminution in value theory, the government is not required to compensate unless its restrictions on property cause such a large decrease in property value that the owner suffers total or near total economic loss. Groundwater users forced to reduce their pumping to comply with need-based quotas would not suffer such loss. Not only would the use of need-based quotas prevent the costly side effects that overdraft sometimes causes, it would also ensure the availability of future water supplies, thus leaving groundwater users with a property right that can hardly be considered valueless. States should not hesitate to restrict groundwater pumping to combat groundwater overdraft.

131. *See supra* notes 117-18 and accompanying text.

THE NINTH AMENDMENT IN THE FEDERAL COURTS, 1965-1980: FROM DESUETUDE TO FUNDAMENTALISM?

BILL GAUGUSH*

INTRODUCTION

Long ignored by the courts as well as by legal and political scholars, the ninth amendment to the United States Constitution has recently attracted considerable attention in the federal courts. The source of this new focus on the ninth amendment is found in Justice Douglas' majority and Justice Goldberg's concurring opinions in *Griswold v. Connecticut*.[1] The new prominence of the ninth amendment is illustrated by examining Shepard's Citations. Prior to *Griswold*, the number of federal court citations to the ninth amendment was less than 100. In the fifteen years after *Griswold*, the number of citations to the ninth amendment exceeded 400. Despite the phenomenal increase in reliance on the ninth amendment in litigation, the legal and political literature does not demonstrate any serious interest in exploring the nature, outcome, or consequences of such reliance.

Only two law review articles offer insight into this concern. In 1972, A.F. Ringold reviewed the *Griswold* ninth amendment legacy in federal court cases.[2] He concluded that the "current success ratio for asserted ninth amendment rights has been so phenomenally large that an attorney would almost be derelict if [s]he did not at least include" the ninth amendment in her or his claim.[3] Lyman Rhoades and Rodney Patula, who examined federal court cases decided during roughly the same period, were less enthusiastic.[4] They concluded that the federal courts exhibited a "reluctance" to use the ninth amendment.[5] Neither article contains a comprehensive analysis of the federal courts' application of the ninth amendment. Each article offers

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1. 381 U.S. 479 (1965). *Griswold* involved a criminal prosecution for advising married persons on the use of contraceptives. The Supreme Court reversed the convictions. Justice Douglas' majority opinion was based on the existence of a zone of privacy for married couples in matters of contraception and marital privacy. This was formed by emanations from the first, third, fourth, fifth, ninth and fourteenth amendments. Justice Douglas did not expound on the future implications of the ninth amendment in litigation. However, Justice Goldberg's concurrence advances the proposition that the ninth amendment is a source of unenumerated rights not located in the fifth and fourteenth amendments, so long as the ninth amendment claim is grounded in a liberty interest.

2. Ringold, *The History of the Enactment of the Ninth Amendment and its Recent Development*, 8 TULSA L.J. 1 (1972).

3. *Id.* at 36.

4. Rhoades and Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since* Griswold v. Connecticut, 50 DEN. L.J. 153 (1973).

5. *Id.* at 163-67.

only a glimpse of the disposition of a group of ninth amendment claims, some of which the courts resolved on grounds other than the merits of the ninth amendment. Rhoades and Patula reviewed claims made under the ninth amendment for the right to teach sex education,[6] the right to demonstrate,[7] and for the rights of prisoners. In each instance, however, the ninth amendment claim was not considered by the courts, as Rhoades and Patula note. For example, questions regarding sex education and public demonstration were decided on first amendment grounds, while the prisoner rights case was decided on the failure to show a violation under the eighth and fourteenth amendment. The court summarily dismissed or failed to address the ninth amendment claim in each instance.[8]

In the years since Ringold's, and Rhoades and Patula's articles, no examination of ninth amendment cases has been published in either the legal or the political science literature. Some effort is necessary to: 1) reexamine the cases covered by Ringold, and Rhoades and Patula, 2) to examine the period through 1979, and 3) to discuss the relevant Supreme Court cases decided after *Griswold*.[9] The central focus of this article is directed at determining what rights are accorded constitutional protection via the ninth amendment in the federal courts.

I. A SURVEY OF NINTH AMENDMENT DECISIONS

A. *The Ninth Amendment in the Supreme Court*

After *Griswold*, only seven majority opinions in the cases decided refer to the ninth amendment.[10] Not one of these uses the ninth amendment as a constitutional source for protecting unenumerated rights. In each the Court

6. Manfredonia v. Barry, 336 F. Supp. 765 (E.D.N.Y. 1971).

7. People v. Doorley, 338 F. Supp. 574 (D.R.I.), *rev'd on other grounds*, 468 F. 2d 1143 (1st Cir. 1972).

8. Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972); Wells v. McGinnis, 344 F. Supp. 594 (S.D.N.Y. 1970); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Negrich v. Hohn, 246 F. Supp. 173 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967).

9. Only majority opinions of the United States Supreme Court, the Courts of Appeals, and the District Courts are included in the analysis of this inquiry. Shepard's Citations and LEXIS were used to identify those cases in which the ninth amendment is cited. Only those cases decided during the period commencing with June 7, 1965, through December 31, 1979, were considered for relevancy, as defined below. Approximately 560 federal court citations were generated through the two legal indexes. Court opinions in which the ninth amendment is cited, but which are not included in this inquiry, include those in which the court disposed of the case for one of the following reasons: 1) on the basis of statutory construction, without reaching the constitutional claims, and 2) on procedural questions, e.g., standing, jurisdiction, abstention. In addition, this inquiry does not include those cases in which the issue of the ninth amendment, as opposed to the case as a whole, was disposed of by one of the following reasons: 1) the court states that the claim asserted under the ninth amendment is a question arising under some other constitutional provision and will, therefore, be treated as such, 2) the court notes that there is no need to consider the ninth amendment claim because its decision concerning other constitutional claims effectively disposes of the case, and 3) the court notes that the merits of the ninth amendment claim are not considered because plaintiff, or appellant, emphasized some other constitutional provision and failed to address the ninth amendment claim.

10. Selection of Supreme Court opinions differed from the selection process for the Courts of Appeals and the District Courts. All majority opinions which could conceivably be interpreted as bearing on the Court's predilections towards the ninth amendment have been included for consideration. Those majority opinions in which the ninth amendment is cited solely

declined the opportunity to explicitly accept or to reject the ninth amendment as a source of authority for identifying unenumerated rights. Justice Douglas' and Justice Goldberg's ninth amendment contributions in *Griswold*, however, have not been modified, limited or overruled. Since subsequent discussions of the ninth amendment have been extremely terse, efforts to identify acceptance of their views on ninth amendment protection for unenumerated rights would involve a speculative process of surmise. A review of these decisions shows the cursory manner in which the Supreme Court has dealt with ninth amendment questions.

Law Students Research Council v. Wadmond[11] involved objections to certain questions on the New York State Bar application. Justice Stewart, writing for the Court, identified and then summarily dismissed the appellant's ninth amendment claims.[12] In response to a privacy claim, Justice Stewart stated: "We think it borders on the frivolous to say that such an inquiry offends the applicant's right to privacy by the First, Fourth, Fifth, Ninth and Fourteenth Amendments."[13] Thereafter, Justice Stewart addressed the substance of appellant's claims and ignored the constitutional source of the right to privacy.

Justice White gave a ninth amendment claim similar treatment in the majority opinion in *Civil Service Commission v. Letter Carriers*.[14] Without specifically addressing the relevance of the ninth amendment, Justice White implicitly rejected any ninth amendment bar to Hatch Act[15] restrictions on political activities of civil service employees: "Our judgment is that neither the First Amendment *nor any other* provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."[16]

The Supreme Court denied ninth amendment privacy claims in two abortion cases, *Roe v. Wade*[17] and *Planned Parenthood of Missouri v. Danforth*.[18] Justice Blackmun wrote for the majority in *Roe* that:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[19]

Yet, Blackmun's silences are more interesting than his affirmative state-

to identify the constitutional claims are not included, nor are concurring or dissenting opinions in which the ninth amendment is discussed or cited.

11. 401 U.S. 154 (1971).

12. The Law Students Research Council argued that certain questions included in the "third-party affidavits attesting to an applicant's good moral character" violated the applicant's right to privacy. One question objected to was whether the affiant visited the applicant's home. *Id.* at 160.

13. *Id.*

14. 413 U.S. 548 (1973).

15. 5 U.S.C. § 7324(a)(2) (1970).

16. 413 U.S. at 556 (emphasis added). The National Association of Letter Carriers sought to have the Hatch Act's "prohibition against active participation in political management or political campaigns with respect to certain defined activity" declared unconstitutional. For a description of the prohibited activities in which the Union sought to partake, see *id.* at 551 n.3.

17. 410 U.S. 113 (1973).

18. 428 U.S. 52 (1976).

19. 410 U.S. at 153 (cited with approval in 428 U.S. at 60).

ments. Blackmun neither avers nor denies that the ninth amendment is an adequate source of constitutional restraint. Moreover, Blackmun does not suggest that the lower court erred by relying on the ninth amendment. Perhaps Blackmun's silence was in deference to the discretion of the lower court. Or possibly he intimated that it was inconsequential whether either the ninth amendment, or the liberty guarantee of the fourteenth amendment, was relied on, or even whether both were relied on, in a case. Thus, Blackmun might have unintentionally advanced the use of the ninth amendment as constitutional authority to protect an unenumerated, fundamental right. However, in *Whalen v. Roe*[20] Justice Stevens dispelled any speculation that Blackmun's statement constituted an implicit acceptance of the ninth amendment as the source of the right to privacy. Writing for a unanimous Court, Stevens noted that the decision in *Roe v. Wade* rested on the personal liberty concept of the fourteenth amendment, and not on the ninth amendment.[21]

The ninth amendment was treated more graciously in *Stanley v. Illinois*,[22] and *Moore v. City of East Cleveland*.[23] In both cases the Court used the liberty guarantee of the fourteenth amendment to strike down the challenged laws. Justice White in *Stanley* and Justice Powell in *Moore*, however, look to seize upon Justice Goldberg's concurrence in *Griswold*, for authority to infuse the claims in these cases with constitutionl protection.[24]

In short, the later Supreme Court opinions reflect tolerance; certainly there is no hearty embrace of the ninth amendment as a constitutional source for the right of privacy which *Griswold* generated. Although the Court has approved of Douglas' and Goldberg's general theories, there has been no disposition to rely on the ninth amendment as interpreted in *Griswold*.[25]

B. *The Ninth Amendment in the Courts of Appeal*

A group of twenty-seven representative Court of Appeals opinions[26]

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20. 429 U.S. 589 (1977).

21. *Id.* at 598 n.23. *Whalen* involved a privacy challenge against a New York record keeping system. The law required that the names and addresses of all persons who obtained, pursuant to a doctor's prescription, certain drugs, be stored in a centralized computer file. Although the plaintiff relied, in part, on the ninth amendment, Justice Stevens did not address that claim at length, his opinion emphasized that the right of privacy was protected by the liberty concept of the fourteenth amendment.

22. 405 U.S. 645 (1972). *Stanley* involved a challenge to an Illinois state law which provided for taking an illegitimate child from the father at the time of the mother's death without a hearing as to the father's fitness. Justice White notes that the right at issue is the "private interest . . . of a man in the children he has sired and raised." *Id.* at 651.

23. 431 U.S. 494 (1977). *Moore* involved an attack on a city ordinance limiting the occupancy of dwelling units to a single family. The ordinance defined "family" in such a manner as to prohibit appellant from housing two of her grandsons, who were first cousins, in her home.

24. *See* Stanley v. Illinois, 405 U.S. at 651, and Moore v. City of East Cleveland 431 U.S. at 503 n.12, respectively.

25. The Supreme Court's most recent abortion decision, City of Akron v. Akron Center for Reproductive Health, Inc. 51 U.S.L.W. 4767 (U.S. June 15, 1983), reinforces the Court's pattern of express reliance on the fourteenth amendment for constitutional protection for freedom of choice in marital and familial matters. *Id.* at 4770.

26. For an explanation of the method used to develop the sample of cases, see note 9 *supra*.

were considered in this inquiry. Only four of these cases, however, suggest that the courts accepted constitutional claims based at least in part on the ninth amendment. The rights upheld in these cases include the right of public school students to control their personal appearance in spite of high school grooming codes,[27] the right of a woman to choose an abortion during the first trimester of pregnancy without the imposition of state restrictions,[28] and the right of parents to rear their children without the state unreasonably taking the youngster's life.[29] An additional seven opinions exhibit acquiescence in the notion that the ninth amendment does protect unenumerated rights. In these cases, however, the courts refused to extend protection to the rights asserted. Generally, this refusal was based on a finding that the claimed right was not within the original notion of privacy enunciated in *Griswold*.

Three separate challenges to public grooming regulations were rejected on the basis that the right to publicly wear one's hair in the style of one's choosing was not a right protected by the *Griswold* marital-familial right of privacy.[30] A request to extend ninth amendment protection to an inmate incarcerated in a penal institution was declined by the Court of Appeals for the Eighth Circuit in *Burns v. Siverson*.[31] Other rights which were asserted

27. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937 (1970). Note that Judge Myron Bright, in his opinion for the court in *Bishop*, cited the opinion in Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) for reliance on the ninth and fourteenth amendments to uphold a claim to a similar right. 450 F.2d at 1071. While the court's opinion in *Crews* contains no mention of the ninth amendment, *Crews* states one's choice in hair style is an element of personal freedom protected by the Constitution. See *Breen*, 419 F.2d at 1036, for authority that the ninth amendment is a possible source for such protection. *Crews*, 432 F.2d at 1203, cites *Griswold* without mentioning the ninth amendment for certain "additional fundamental rights" existing alongside those enumerated in the first eight amendments.

28. Mahoning Women's Center v. Hunter, 610 F.2d 456 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (no discussion of ninth amendment). Examples of requirements set by the regulation include: that anesthesia be administered by an anesthesiologist; that nursing personnel must be supervised and directed by a registered nurse who has post-graduate education or experience in obstetric or gynecological nursing. The clinic was also required to have various "expensive and elaborate equipment." *Id.* at 458.

29. Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974), *vacated*, 431 U.S. 171 (1977) (no discussion of ninth amendment). Mattis's eighteen year old son, Michael, and a friend had broken into a golf course office to steal money. When the police arrived, the youths attempted to flee. One of the police officers gave chase after Michael. When the officer realized that he could not keep up, he ordered Michael to halt, which Michael refused to do. The officer then fired what he thought was "well above" Michael, but struck Michael in the head. The court of appeals held that the father had a constitutional right to "raise his son," and could, therefore, challenge the validity of the shooting for the purpose of seeking declaratory relief. *Id.* at 595.

30. Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972) (en banc), *cert. denied*, 409 U.S. 989 (1972); Freeman v. Falke, 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972) (Douglas, J., dissenting); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). Not included in this inquiry, but of some interest, are two court of appeals opinions in which the judges relied on *Karr* or *Jackson*, but did not mention the ninth amendment. In Sherling v. Townley, 464 F.2d 587 (5th Cir. 1972), decided shortly after *Karr*, the court stated it felt bound by the holding in *Karr*. (But note Judge Tuttle's concurring opinion, in which he expresses agreement with the dissenting judges in *Karr*). In Gfell v. Rickelman, 441 F.2d 444, 446 (6th Cir. 1971), the court reaffirmed the "principles of" *Jackson*.

31. 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972). The exact nature of the ninth amendment claim is not clear from a reading of the court's opinion. The court of appeals reversed the district court's holding that the isolated detention in maximum security to which the inmate was committed violated the prisoner's due process rights. On appeal Burns argued

but found to be without ninth amendment protection include the asserted right of a husband to stay with his wife in a public hospital's delivery room,[32] an individual's right to possess an unregistered submachine gun,[33] a postal patron's right to be free from mail covers by the United States Bureau of Customs,[34] and Florida state legislators' right to be free from compelled disclosure of certain personal financial information.[35]

In the remaining sixteen cases, the Courts of Appeals disposed of claims, based in part on the ninth amendment, by concluding that the government possessed the constitutional authority to engage in the challenged activity. In these cases the courts did not explicitly reject the proposition that the ninth amendment may be invoked for asserting an unenumerated right. The courts ruled against challenges to induction orders,[36] the "equal time" provision of the "Fairness Doctrine" for broadcasters,[37] the manner of congressional representation in the District of Columbia,[38] a deportation order issued by the Immigration and Naturalization Service,[39] subpoenas issued

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that, *inter alia*, the district court's order to expunge his record of the detention was supported by the ninth amendment. *Id.* at 778.

32. Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 721 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976).

33. United States v. Warin, 530 F.2d 103, 108 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976).

34. United States v. Choate, 576 F.2d 165, 181 (9th Cir.), *cert. denied*, 439 U.S. 953 (1978). The Bureau of Customs had arranged with the United States Postal Inspector to obtain addresses from the face of the envelopes addressed to Choate for the purpose of locating a source of narcotics in South America.

35. Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). The disclosure was mandated by an amendment to the Florida Constitution, which required elected and other public officials and employees to file a public statement detailing their assets and liabilities over $1,000.

36. United States v. Murray, 452 F.2d 503 (8th Cir. 1971), *cert. denied*, 405 U.S. 935 (1972); United States v. Sowul, 447 F.2d 1103 (9th Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972); United States v. Zaugh, 445 F.2d 300 (9th Cir. 1971); United States v. Farrell, 443 F.2d 355 (9th Cir.), *cert. denied*, 404 U.S. 853 (1971); United States v. Uhl, 436 F.2d 773 (9th Cir. 1970); United States v. Diaz, 427 F.2d 636 (1st Cir. 1970). Appellants challenged their induction orders on such grounds as: the induction unconstitutionally interfered with the "right to life" (*Diaz*, 427 F.2d at 639), that the Selective Service law was unconstitutional during a period in which there was no "dire emergency" (*Uhl*, 436 F.2d at 774), or that one is exempt from military service because of one's "religious scruples under the First and Ninth Amendments" (*Murray*, 452 F.2d at 504). The courts rejected these challenges on the ground that the Congress has the power to conscript individuals into the armed forces.

37. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969) (no discussion of ninth amendment). Red Lion Broadcasting argued that the "equal time" provision of the FCC mandated by the "fairness in broadcasting" doctrine constituted a prior restraint and, therefore, deprived them of their political rights retained by the ninth amendment. *Id.* at 925.

38. Breakefield v. District of Columbia, 442 F.2d 1227, 1228-29, 1228 n.4 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 909 (1971); Carliner v. Commissioner, 412 F.2d 1090 (D.C. Cir. 1968) *cert. denied*, 396 U.S. 987 (1969).

39. Cervantes v. Immigration and Naturalization Service, 510 F.2d 89 (10th Cir. 1975). Mr. and Mrs. Cervantes were in the United States illegally. The husband had exceeded the six month temporary stay originally granted by the Department of Immigration and Naturalization Service. In addition, he moved to Kansas for employment without informing the Department of his move. His fiancee entered the country illegally from Mexico, and joined him in New York where they were married and continued to live. During this period, they had a child. The couple filed suit in the court of appeals arguing that their son, an American minor, had a ninth amendment right "to continue to have the love and affection of his parents in the United States." *Id.* at 91.

by federal grand juries,[40] and an army reservist grooming code.[41] Other failed challenges include an effort to avoid an Internal Revenue summons,[42] and a claim by a school board that a "freedom of choice" school placement policy was justified by the ninth amendment.[43] Finally, in *Mapco Inc. v. Carter*,[44] an Emergency Court of Appeals rejected an oil company's contention that it had a ninth amendment right "to trust the federal government and rely on the integrity of its pronouncements."[45]

In general, the Courts of Appeals have restricted ninth amendment protection to the right of privacy in *Griswold*. When the claim asserted under the ninth amendment was too broad, several courts expressed the view that only those rights specified in *Griswold*, such as the right to privacy of the home, the general rights of family and procreation, and the right to marital privacy, were protected through the ninth amendment. However, some cases did begin to expand the limits. A broader conceptual framework was offered in *Plante v. Gonzalez*,[46] which limited the right to privacy to those situations involving personal autonomy and confidentiality. In *Breen v. Kahl*,[47] the court of appeals upheld the right to choose one's hair style, because the issue was one of personal freedom; the judgment in *Mattis v. Schnarr*[48] found that a father had a right to rear his son based on the right to raise a family, a right implicitly recognized in *Griswold*; and, the court's judgment in *Mahoning Women's Center v. Hunter*[49] rested upon the determination that a woman's right to have an abortion during the first trimester of pregnancy involved the constitutionally protected area of a woman's autonomy.

The unwillingness to extend the *Griswold* concept of the ninth amend-

40. *In re* January 1976 Grand Jury, 534 F.2d 719, 730 (7th Cir. 1976).

41. Anderson v. Laird, 437 F.2d 912 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971). While in the Army Reserves, Anderson had a number of unexcused absences from obligatory meetings. Although he attended the meetings, he was recorded as absent because his hair length violated army grooming codes. As a result, Anderson was ordered to active duty. His attempt to reverse the induction order by challenging the army's grooming code was rebuffed by Judge Wilbur Pell, Jr. Judge Pell reasoned that if Anderson "were completely in civilian status, his position would have legally persuasive stature." But, Judge Pell concluded, the rights of individuals in the armed forces are balanced against compelling governmental interests, and that "it is not for civil courts to judge whether the military has properly determined the balance between military needs and personal rights." *Id.* at 914.

42. United States v. Silkman, 543 F.2d 1218, 1220 (8th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977).

43. United States v. School Board of Franklin City, 428 F.2d 373 (4th Cir. 1970). *School Board of Franklin City* consists of three cases consolidated into one. The ninth amendment claim was made in Covington v. United States, *id.*

44. 573 F.2d 1268 (Temp. Emer. Ct. App.), *cert. denied*, 437 U.S. 904 (1978).

45. *Id.* at 1273. Mapco sought to enjoin implementation of a "rollback" of prices of "upper-tier" domestic crude oil, arguing that the establishment of the two-tier pricing system was devised and pronounced by the federal government for the purpose of providing oil companies with incentive to increase domestic drilling and development. Consequently, Mapco maintained, it had a ninth amendment right to the "expectation that the maximum prices of upper-tier oil would never be regulated or reduced by the federal government." *Id.* at 1280.

46. 575 F.2d 1119 (5th Cir. 1978). *See supra* note 35 and accompanying text.

47. 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *See supra* note 27 and accompanying text.

48. 502 F.2d 588 (8th Cir. 1974), *vacated*, 431 U.S. 171 (1977) (no discussion of the ninth amendment). *See supra* note 29 and accompanying text.

49. 610 F.2d 456 (6th Cir. 1979), *vacated*, 447 U.S. 918 (1980) (no discussion of the ninth amendment). *See supra* note 28 and accompanying text.

ment is also evident in those decisions where the court determined that the right asserted was foreclosed because the government had constitutionally derived power to control that area. None of the cases that were disposed of on this basis involve a right similar, either in nature or in circumstance, to those specified earlier by the courts as appropriate for ninth amendment protection.

Of the cases outlined, the only real conflict pits the Fifth and Sixth Circuits against the Seventh and Eighth Circuits. While the former hold that an individual's choice of hair style is not a fundamental right under the ninth amendment, the latter two circuits conclude otherwise.[50]

C. *The Ninth Amendment in the District Courts*

A representative group of fifty-seven district court decisions were gathered for this discussion. Twenty-seven decisions of these relevant cases held that the rights asserted were protected, at least in part, by the ninth amendment. Of these, eighteen involved matters of personal decisions; it was claimed in most cases that the consequences of these decisions were confined to the individual making the decision. This category includes suits brought by military reservists who wanted to wear wigs during training,[51] challenges by public high school students to school grooming codes,[52] an individual's claimed right to obtain obscene material,[53] challenges to state abortion regulations,[54] and the asserted individual right to use "a nontoxic substance [in

50. Note that the United States Supreme Court has yet to rule on the question of the constitutionality of a public school's grooming code. The Court, however, examined a police department's grooming code in Kelley v. Johnson, 425 U.S. 238 (1976). Justice Rehnquist wrote that the regulations involved in *Kelley* did not violate any substantive rights guaranteed by the fourteenth amendment. Rehnquist argued that for that case's purpose, it was "assume[d]" that "the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance. . . ." *Id.* at 244. However, the "claim of a member of a civilian service based on the 'liberty' interest protected by the Fourteenth Amendment must [not] necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public." *Id.* at 249.

51. Etheridge v. Schlesinger, 362 F. Supp. 198 (E.D. Va. 1973); Brown v. Schlesinger, 365 F. Supp. 1204 (E.D. Va. 1973).

52. Copeland v. Hawkins, 352 F. Supp. 1022 (E.D. Ill. 1973); Watson v. Thompson, 321 F. Supp. 394 (E.D. Tex. 1971), *vacated*, 458 F.2d 1361 (5th Cir. 1972); Berryman v. Hein 329 F. Supp. 616 (D. Idaho 1971); Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Black v. Cothren, 316 F. Supp. 468 (D. Neb. 1970); Reichenberg v. Nelson, 310 F. Supp. 248 (D. Neb. 1970); Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).

53. United States v. Orito, 338 F. Supp. 308 (E.D. Wis. 1970), *vacated*, 413 U.S. 139 (1973); United States v. B & H Distrib. Corp., 319 F. Supp. 1231 (W.D. Wis. 1970), *vacated*, 403 U.S. 927 (1971), *aff'd on other grounds*, 347 F. Supp. 905 (W.D. Wis. 1972), *vacated*, 413 U.S. 909 (1973), *acq.* 375 F. Supp. 136 (W.D. Wis. 1974). The original opinions in *Orito* and *B & H* rely principally on Stanley v. Georgia, 394 U.S. 566 (1968), for the proposition that the first amendment protects the right to read obscene material in the privacy of one's home. While the judges in *Orito* and *B & H* argued that the right to obtain such material was also protected, the Supreme Court rejected this, citing U.S. v. Reidel, 402 U.S. 351 (1971); and United States v. Thirty Seven (37) Photographs, 402 U.S. 363 (1971).

54. Doe v. Mundy, 378 F. Supp. 731 (E.D. Wis. 1974), *aff'd*, 514 F.2d 1179 (7th Cir. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), *vacated* 410 U.S. 950 (1972); YWCA v. Kugler, 342 F. Supp. 1048 (D. N.J. 1972) *aff'd mem.*, 493 F.2d 1402 (3d Cir. 1974); Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973); Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970), *modified on other grounds*, 410 U.S. 113 (1973); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

this case the drug Laetrile] in connection with one's personal health care."[55] Five cases concern claims involving interpersonal relationships of a formal familial or informal associational nature. The issues in these cases include a challenge to a Merchant Marine Academy's regulation prohibiting its cadets from marrying,[56] the claimed rights of a parent and minor child to attend a lecture on contraception,[57] and the asserted right of a parent to protect her child from state distribution of contraceptive information.[58] Other actions objected to on this basis include the dismissal of an unmarried teacher[59] and an unmarried civil servant[60] for sleeping or living with a member of the opposite sex. The other opinions in this category upheld a residential anti-picketing ordinance on the ground that the right to privacy includes tranquility, protected in part by the ninth amendment;[61] a racially discriminatory membership policy of a private country club, because associational rights are protected privacy interests;[62] upheld an indictment of a private individual for conspiring to electronically intercept business communications because the ninth amendment protects a bundle of unexpressed privacy interests.[63] Finally, on grounds that prison overcrowding constituted severe confinement conditions, offensive to the ninth amendment, the court ordered a change in the prison conditions.[64]

A second major category of district court cases are those in which the courts acknowledged the ninth amendment as a source of constitutional protection for the right to privacy, but concluded that the case presented circumstances which did not involve privacy interests protected by the *Griswold* decision. Thus, the courts upheld two state statutes requiring unwed mothers to furnish the name of the child's putative father,[65] rejected a plaintiff's claim to an environment free from tobacco smoke,[66] upheld a public

55. Rutherford v. United States, 438 F. Supp. 1287 (W.D. Okla. 1977), *rev'd*, 616 F.2d 455 (10th Cir.), *cert. denied*, 439 U.S. 1128 (1980).

56. O'Neil v. Dent, 364 F. Supp. 565 (E.D. N.Y. 1973).

57. Manfredonia v. Barry, 401 F. Supp. 762 (E.D. N.Y. 1975). Ms. Manfredonia was arrested for bringing her fourteen month old daughter to a lecture, given by William Baird, on the subject of contraceptives. She was charged under N.Y. PENAL LAW § 260.10 (McKinney 1974) which makes it a misdemeanor for anyone to endanger the welfare of a child.

58. Doe v. Irwin, 428 F. Supp. 1198 (W.D. Mich.), *vacated mem.*, 559 F.2d 1219 (6th Cir. 1977), *aff'g* 441 F. Supp. 1247 (6th Cir. 1977), *dismissed*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 1829 (1980).

59. Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), *aff'd*, 476 F.2d 375 (8th Cir. 1973).

60. Mindel v. United States Civil Service Comm'n, 312 F. Supp. 485 (N.D. Cal. 1970).

61. People v. Doorley, 338 F. Supp. 574 (D. R.I.), *rev'd*, 468 F.2d 1143 (1st Cir. 1972).

62. Wright v. Salisbury Club, Ltd., 479 F. Supp. 378 (E.D. Va. 1979), *rev'd*, 632 F.2d 309 (4th Cir. 1980) (since the "private" club involved was not a truly private social organization, the court dismissed the ninth amendment argument).

63. United States v. Perkins, 383 F. Supp. 922 (N.D. Ohio 1974).

64. Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976). Although the court specifically found a violation of the ninth amendment, the opinion is unclear as to the nature of the ninth amendment right that was involved.

65. Burdick v. Miech, 385 F. Supp. 927 (E.D. Wis. 1974); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated per curiam*, 422 U.S. 391 (1975), *modified sub nom.* Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976), *vacated per curiam*, 432 U.S. 526 (1977).

66. Gasper v. Louisiana Stadium and Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 493 U.S. 1073 (1979).

high school's grooming code,[67] and held that the Mann Act's prohibition on the interstate transportation of women for prostitution purposes did not violate a ninth amendment guarantee to privacy.[68] Other district court's have rejected a claim that the right to privacy protected one from unwarranted publicity,[69] upheld a city ordinance prohibiting the use of the word "Saloon" for any premise on which alcohol was sold,[70] and held that a New York statutory eviction procedure did not infringe upon any " 'right to housing' within the ambit of the ninth amendment."[71]

In a number of environmental cases, the courts held that the right to a clean environment was not protected by the ninth amendment.[72] The courts made no effort in these cases to identify when the environment might conceivably be protected by the ninth amendment. The opinions, however, do not dispute that the ninth amendment is a source of constitutional protection for other unidentified rights.

In eight cases, the courts rejected challenges to the government imposing restrictions or obligations, on the basis that the sovereign possessed the requisite constitutional authority to impose such restrictions or obligations. In two instances, the courts upheld the dismissal of civil servants for participating in political activities in violation of the Hatch Act.[73] A Seventh Day Adventist's refusal to pay union dues was rejected on the ground that Congress, under its power to regulate interstate commerce, could provide for collective bargaining under which the "employer and the federally-employed representative of employees . . . [could] make a collective bargain requiring union membership."[74] A serviceman's challenge to transfer orders which would have sent him to Vietnam,[75] and a civilian's challenge to an induc-

67. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969).

68. United States v. Ceasar, 368 F. Supp. 328 (E.D. Wis. 1973), *aff'd mem. sub nom.*, United States v. Harden, 519 F.2d 1405 (7th Cir. 1975).

69. Reilly v. Leonard, 459 F. Supp. 291 (D. Conn. 1978). Reilly filed a suit alleging that his right to privacy had been violated when the police published an investigative report which concluded that he was the murderer of his mother. The report was published after the Attorney General rejected it and an information against Reilly was dismissed with prejudice.

70. Boscia v. Warren, 359 F. Supp. 900 (E.D. Wis. 1973).

71. Velazquez v. Thompson, 321 F. Supp. 34 (S.D. N.Y. 1970), *aff'd* 451 F.2d 202 (2d Cir. 1971).

72. *In re* "Agent Orange" Product Liability Litigation, 475 F. Supp. 928 (E.D. N.Y. 1979); Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D. N.J. 1978); Upper West Fork River Watershed Ass'n v. Corps of Engineers, 414 F. Supp. 908 (N.D. W. Va. 1976), *aff'd mem.*, 556 F.2d 576 (4th Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); River v. Richmond Metropolitan Auth., 359 F. Supp. 611 (E.D. Va. 1973), *aff'd per curiam* 481 F.2d 1280 (4th Cir. 1973); Hagedorn v. Union Carbide Corp. 363 F. Supp. 1061 (N.D. W. Va. 1973); Virginians for Dulles v. Volpe, 344 F. Supp. 573 (E.D. Va. 1972), *aff'd in part, rev'd in part*, 541 F.2d 442 (4th Cir. 1976); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1970), *aff'd*, 470 F.2d 289 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973).

73. Hatch Political Activities Act, Ch. 640, 54 Stat. 767 (1940) codified as amended at 5 U.S.C. § 1501-1505 (1976). Democratic Cent. Comm. for Montgomery County v. Andolsek, 249 F. Supp. 1009 (D. Md. 1966); Fishkin v. United States Civ. Serv. Comm'n, 309 F. Supp. 40 (N.D. Cal. 1969), *dismissed*, 396 U.S. 278 (1970).

74. Linscott v. Millers Falls Co., 316 F. Supp. 1369, 1372 (D. Mass. 1970), *aff'd*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

75. Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), *aff'd*, 443 F.2d 1039, *cert. denied*, 404 U.S. 869 (1971). Orlando sought to void the orders by arguing that his rights as a citizen

tion notice,[76] were rejected, as was the challenge of a military reservist to a requirement that he participate in a Veteran's Foreign War parade.[77] Environmentalists seeking to prevent mining operations in the Challis National Forest, located in Idaho, were rebuffed; the court found that Congress, and not the citizenry, has the constitutional power to dispose of minerals in land owned by the United States.[78] A challenge to an indictment under the Hobbs Act[79] was also rejected by the court.[80]

In three of the remaining cases, the district courts held that the asserted rights were indeed fundamental but, under the circumstances, the state had a more compelling interest. Consequently, the courts upheld grooming codes for inmates,[81] and for police officers,[82] and upheld the discharge of a teacher for expressing, in her economics class, her opinions concerning the issue of students' rights and corporal punishment.[83] The final two cases, involving a challenge to a high school grooming code,[84] and a claim to a protected environment,[85] are the only ones which state that the ninth

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were violated because the conduct of the war in Vietnam was not authorized by Congress and the Executive had no constitutional authority to continue it.

76. United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970).

77. Jones v. United States Secretary of Defense, 346 F. Supp. 97 (D. Minn. 1972). Jones maintained that because the parade coincided with a speech that was to be delivered by then Vice President Spiro Agnew, the parade indirectly promoted the Vice President's political candidacy for reelection. Jones supported the Democrats and the presidential candidacy of Senator George McGovern.

78. Honchok v. Hardin, 326 F. Supp. 988 (D. Md. 1971).

79. Hobbs Anti-Racketeering Act, ch. 645, 62 Stat. 793 (1948) codified as amended at 18 U.S.C. § 1951-1955 (1976).

80. United States v. Howe, 353 F. Supp. 419 (W.D. Mo. 1973). Howe was indicted for compelling a tavern owner to provide space for various coin operated machines.

81. Howard v. Warden, Petersburg Reformatory, 348 F. Supp. 1204 (E.D. Va. 1972), *dismissed mem.*, 474 F.2d 1341 (4th Cir. 1973).

82. Stradley v. Andersen, 349 F. Supp. 1120 (D. Neb. 1972), *aff'd*, 478 F.2d 188 (8th Cir. 1973).

83. Ahern v. Board of Education, 327 F. Supp. 1391 (D. Neb. 1971), *aff'd*, 456 F.2d 399 (8th Cir. 1972). Ms. Ahern was suspended when, during class time, she criticized the action of a substitute teacher who slapped a student. In addition, during the discussion Ms. Ahern raised issues pertaining to students' rights. Judge Urbom argued that although Ms. Ahern had a right to express her opinions, there is no right to express them during class in violation of a superior's admonition not to do so when the subject of her opinion is directly related to student and teacher discipline. *Id.* at 1397.

84. Pritchard v. Spring Branch Independent School District, 308 F. Supp. 570 (S.D. Tex. 1970). Judge Allen Hannay dismissed the relevance of the ninth amendment in the following words:

> The Ninth Amendment . . . has traditionally been construed to pertain to the proper allocation of governmental power between the federal and state sovereigns. . . . It would be the opposite of this to ascribe to the stately 18th century rhetoric of the Ninth Amendment an intent to enlarge at the expense of the several states the federal judicial power created by Article III of the Federal Constitution—a judicial power amply extended by the Fourteenth Amendment and its authoritative interpretation across the years.

Id. at 577.

85. Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). Judge Robert Taylor rejected any contention that the ninth amendment could be invoked as a source of constitutional protection for the area to be flooded, by pointedly stating that "the Ninth Amendment grants no substantive rights." Thereafter, Judge Taylor also stated: "The Ninth Amendment simply provides that the specification of certain rights in the Constitution shall not be construed to deny or disparage other rights retained by the people." *Id.* at 611. Note also that Judge Taylor cited the opinion in *Tanner* to support his assertion that the ninth amendment grants no substantive

amendment affords no protection to unenumerated rights.

To summarize, in every case where the judges addressed rights which they considered to be protected by the ninth amendment, the judges restricted the protection to the general right of privacy. In most cases, the judges only addressed the question whether the right that a plaintiff asserted was included in the definition. The courts did this without attempting to criticize or limit the right to privacy itself. Only Chief Judge Clarie, in *Reilly v. Leonard*,[86] tried to define the scope of the right to privacy. According to Judge Clarie, the right to privacy protects one "from substantive regulation by the government"[87] only in those areas involving "private conduct in 'matters relating to marriage, procreation, contraception, family relationships, and child rearing and education'."[88] With few exceptions, the other judges who sought to characterize an aspect of the right to privacy and whether it is protected by the ninth amendment, restricted their identifications to aspects of privacy equivalent to or similar to those identified by Judge Clarie. While those opinions extending ninth amendment privacy protection to the choice of hair style or the receipt of obscene material may not fit exactly within Judge Clarie's conception of the constitutional right to privacy, nevertheless, according to other judges, such conduct also finds shelter under the wings of ninth amendment privacy.

II. DISCUSSION

As this review illustrates, the federal courts have, with few exceptions, restricted the scope of ninth amendment protection to the marital-familial aspect of the right to privacy. Where efforts to define the scope of this right have been made, they have generally been limited to protecting the autonomy of the individual, matters concerning the family and procreation, (including marriage and contraception), and such aspects of family relationships as child rearing and education. Other rights which are easily distinguished from the marital-familial axis were held by the courts to be unprotected by the ninth amendment. For example, the courts consistently rejected contentions that the ninth amendment includes protection for a clean environment.[89] The courts were unwilling to extend ninth amendment protection to the naming of one's tavern as one pleased,[90] or to the discussion of corporal punishment in a classroom.[91] Moreover, the decisions reviewed demonstrate that ninth amendment rights are not absolute; they may be balanced against legitimate governmental interests. In addition, courts rejected ninth amendment claims which infringed on the exercise of other legitimate constitutional powers.

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rights. In so doing, Judge Taylor interpreted the treatment of the ninth amendment claim in *Tanner* expansively and erroneously. Judge Noel's ruling in *Tanner* concerning the ninth amendment is limited to the question of environmental concerns, and not to the ninth amendment proper.

86. 459 F. Supp. 291 (D. Conn. 1978).

87. *Id.* at 299.

88. *Id.* at 300, *quoting*, Paul v. Davis, 424 U.S. 693, 713 (1976).

89. *See supra* note 70.

90. *See supra* note 68.

91. *See supra* note 81.

Beyond these obvious conclusions lie some intriguing undercurrents which provide portents of the future significance of the ninth amendment to the protection of unenumerated rights. Ostensibly, Ringold's, and Rhoades and Patula's views of the status of the ninth amendment are correct. It appears that, as Ringold has written, the "success ratio for asserted ninth amendment rights has been so phenomenally large that an attorney would almost be derelict if (s)he did not at least include" the ninth amendment in her or his claim.[92] This is most probably the result of the marked growth in ninth amendment claims made since *Griswold*, and success of even a small number of those actions. This also accommodates Rhoades and Patula's assessment that the courts have exhibited a "reluctance" to use the ninth amendment.[93] The matter is obviously one of perspective. Significantly, however, both articles ignore altogether the rationales underlying the ultimate decisions of the courts. The rationale for the result in these cases indicate, however, the scope of the ninth amendment's status, and its future in the judiciary.

An overwhelming number of the cases examined do not directly address whether, under the circumstances of each case, the ninth amendment was properly invoked. *Griswold* is the only case in which the Supreme Court found a right, the right to privacy, and rested it squarely upon the ninth amendment. Yet in subsequent cases involving privacy questions the Court deliberately avoided connecting that right to the ninth amendment, holding instead that the right was encompassed within the liberty concept of the fourteenth amendment. Moreover, in every instance after *Griswold*, the Court avoided the question of the relationship of the ninth amendment to the constitutional scheme of fundamental rights. In effect, immediately after the Court gave life to the right of privacy on ninth amendment grounds, the new child privacy was placed under the aegis of the more structured and familiar guardian "liberty," to be nurtured and cultivated. Thus, while the right to privacy has become firmly entrenched in the American scheme of constitutional rights, the ninth amendment basis for this right has become relegated to limbo; it is neither repudiated nor immuted as a constitutional source of protection. This effect is evident in many lower federal court decisions. Rather than moving toward an acceptance or rejection of the ninth amendment, the lower courts have focused on the more general question of whether the particular right asserted was encompassed by the broader concept of the right to privacy.[94] This approach is illustrated by Judge Myron Bright's opinion in *Bishop v. Colaw*.[95] Judge Bright cited a number of cases for the point that while courts found protection in the ninth amendment right to privacy for the right to choice in governing personal appearance,

92. *See* Ringold, *supra* note 2, at 36.

93. *See* Rhoades and Patula, *supra* note 4, at 163-67.

94. This may also account for another tactic used by a number of judges in addressing a claim of privacy based, in part, upon the ninth amendment. In these cases (not included in this inquiry), the judges cite the ninth amendment, among others, upon which the petitioners based their privacy claim. The judges then direct their attention to the substantive questions respecting the nature of the right to privacy, and the particular claim presented, without any consideration of the specific constitutional provisions from whence the right to privacy derives.

95. 450 F.2d 1069 (7th Cir. 1970).

others found the same protection in the due process clause of the fourteenth amendment, and still others found it in the privacy penumbra of the Bill of Rights. Rather than indicating a preference, Judge Bright dismissed the need to make a choice:

> A close reading of these cases reveals, however, that the differences are more semantic than real. The common theme underlying decisions striking down hair style regulations is that the Constitution guarantees rights other than those specifically enumerated, and that the right to govern one's personal appearance is one of those guaranteed.
>
> The existence of rights other than those specifically enumerated in the Constitution was recognized by the Supreme Court in *Griswold*. . . . Much of the present divergence of opinions as to the source of the right asserted here can be traced to the different approaches adopted by the Justices in *Griswold*. We see no point in rehashing these different approaches, since under any of them, the conclusion follows that certain additional rights exist.[96]

The current ninth amendment dilemma may be traced to the lack of clarity in Justices Douglas' and Goldberg's opinions in *Griswold* concerning the proper interpretation of the ninth amendment.[97] These questions arise: how is the ninth amendment to be applied, and what is its relation to the rest of the Constitution?[98] Although both Justices Douglas and Goldberg use the ninth amendment, courts and commentators disagree as to the application and impact of that invocation.[99] Moreover, Justice Harlan and Justice White each wrote a concurrence in *Griswold*, in which they relied exclusively upon the liberty guarantee of the fourteenth amendment. With

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96. *Id.* at 1075. This is not to suggest, however, that every judge exhibited such equivocation. Writing for the Court of Appeals in *Mahoning*, Judge Merritt is representative of a few judges who expressed at least partial reliance on the ninth amendment:

> In addition to formulating specific limitations on government in the first eight amendments of the Constitution, the founding fathers in a more general way carved out a slice of human affairs of a private nature which should be 'retained by the people' without legislative interference. The ninth amendment provides that '[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

456 F.2d at 459.

97. A number of legal commentators differ as to the proper interpretation of Goldberg's and Douglas' opinions; this is some indication of possible ambiguities in these opinions.

98. Although this is a matter of considerable constitutional importance, satisfactory discussion here is beyond the scope of this inquiry. A brief descriptive statement of each of the four theories is set forth to provide some guidance, however: 1) the "Independent Source" theory: the ninth amendment operates as a shield to protect unspecified, fundamental rights, just as each of the first eight amendments directly protects the rights specified in text, 2) the "Operationalize Due Process" theory: the ninth amendment directs the courts to interpret broadly the due process guarantees of the fifth and fourteenth amendments, 3) the "Enabling Analogous Rights" theory: the ninth amendment may be invoked for the sole purpose of expanding or protecting those rights enumerated throughout the Constitution, most particularly rights identified in the first eight amendments and, 4) the "Rule of Construction" theory: the ninth amendment adds nothing in the way of substantive rights, its sole purpose being to guard against a misconstruction of any enumerated or interpreted constitutional guarantee.

99. *See, e.g.*, Beaney, *The* Griswold *Case and the Expanding Right to Privacy*, 1966 WIS. L. REV. 979, 982; Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235, 243 (1965-66); and Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680, 686 (1966-67).

this panoply of viewpoints before them, it is no wonder that the lower federal courts generally remain silent on the details of ninth amendment jurisprudence.[100] The absence of an established form for ninth amendment adjudication has, however, proven to be less a barrier than might be expected in justifying the final judgment of the courts. Where there was a case factually similar to the one under consideration, which recognized a similar substantive right, the examining court would follow the earlier case and recognize the asserted right. On the other hand, where precedent was unavailable, the courts were not inclined to extend constitutional protection. This pattern was reflected by comments in those cases which intimated the court could not recognize the asserted ninth amendment right because of the absence of guiding precedent.

CONCLUSION

The courts have been willing to recognize that constitutional claims may be based on the ninth amendment. The courts are more willing to give ninth amendment protection, however, to matters that fall within the marital-familial aspects of privacy. Because of this hesitancy to push *Griswold* beyond the family, a complete view of the breadth and depth of the ninth amendment in the federal courts has yet to develop. The overwhelming number of lower federal court cases examined lend themselves to the following general assessment: A ninth amendment claim is more likely to receive favorable judicial recognition when it is used in asserting the marital-familial form of the right to privacy. The further the ninth amendment claim is from the marital-familial axis, the less acceptance it will receive.

If the ninth amendment is to be expanded, or explained, the responsibility for doing so resides with the Supreme Court. Should the Supreme Court choose to invoke the ninth amendment for the purpose of protecting a particular right, lower courts will follow suit. The absence of Supreme Court guidance has discouraged an expansive interpretation of the ninth amendment rights by the lower federal courts.[101] Judge Garnett Eisele's

100. Judge Cummings' opinion in *United States v. Choate*, is the exception. His opinion is worth quoting at length.

> The specific sources for zones of privacy in the Constitution seem only to include the First, Third, Fourth, Fifth, and Ninth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 484, ... If a zone of privacy cannot be grounded on neutral principles rooted in one of these constitutional sources, it simply does not enjoy constitutional protection. . . .
>
> Requiring that a constitutional right be locatable in the Constitution most emphatically does not, of course, suggest a strict circumscription of the various specific constitutional guarantees in the Bill of Rights. Each guarantee still has its *Griswold* penumbras and emanations. But if it is demonstrated *seriatim* that none of the specific guarantees creates a zone of privacy in a given case, then there simply is not a constitutional 'right of privacy' in that case. Nor is there any question of synergistic coupling between the several Bill of Rights guarantees to create by the operation of all of them together a constitutional right not locatable in any one of them.

576 F.2d at 173-74. *See also supra* notes 84 and 85.

101. Two possible additional factors inhibiting efforts by the lower courts to undertake such an endeavor include 1) the failure on the part of the litigants to provide the courts with sufficient elaboration concerning the relevance of the ninth amendment (a concern specifically noted by some judges); and 2) the apparent lack of awareness, on the part of the judges and justices, of the ninth amendment literature.

opinion in *Environmental Defense Fund v. Corps of Engineers of United States Army* expresses the hesitancy of the lower federal courts to formulate new jurisprudence independent of Supreme Court guidance:

> [S]uch claims, even under our present Constitution are not fanciful and may, indeed, someday, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand in *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809 (2d Cir. 1944):
>
> > Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.
>
> The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century. But . . . the plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights as alleged . . . in their complaint.[102]

This opinion intimates that lower courts are justifiably unwilling to bring the ninth amendment from the "womb" to the courtroom without some strong assistance from the Supreme Court. This reluctance remains in spite of the ninth amendment's promising future. Of course, this bodes poorly for the incorporation, at least in the near future, of novel unenumerated rights through the mechanism of the ninth amendment. The federal courts remain firm in their resolve to look to the Supreme Court for guidance. The Supreme Court, however, has been reluctant to invoke the ninth amendment when a more specific constitutional provision guarantees the constitutional right at issue.

Insofar as substantive unenumerated rights are concerned, the development of the ninth amendment has been limited. Nevertheless, the treatment given to the ninth amendment to this date may have greater significance in the future. So far, some federal courts have recognized that the ninth amendment provides sustenance for unenumerated fundamental rights.

While *Griswold* may have sown the ninth amendment seed, it did so without regard for the fertility or receptivity of the judicial furrows in which it was sown. Nevertheless, the courts of appeal and the district courts have nurtured that seed to the point where it has developed its own root system, anchoring it into the field where fundamental rights are found.

An expansion of the ninth amendment might occur one day provided the Supreme Court becomes convinced that such an expansion is necessary. Ultimately, the ninth amendment's potential may not begin to be seriously explored until such time as the Justices of the Supreme Court are confronted with a political or judicial climate which compels them to seek out reliance on unchartered constitutional guarantees.[103]

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102. 325 F. Supp. at 739.

103. A recent case which gives some sense of the direction in which the Court is headed with the ninth amendment is the opinion in Richmond Newspaper Inc. v. Virginia, 448 U.S. 555 (1980). Only Justices White and Stevens joined in Chief Justice Burger's opinion. Justice William Rehnquist registered the only dissent, while others wrote concurring opinions. Writing for the Court, Chief Justice Burger found that the right of the public and the press to attend crimi-

nal trials is guaranteed under the first and fourteenth amendments and could be restricted only upon a showing of an "overriding interest." The first amendment, Burger argued, "can be read as protecting the right of everyone to attend trials so as to give meaning to . . . [the] explicit guarantees [such as freedom of speech and press]." To support this contention, Justice Burger invokes the ninth amendment, reviewing briefly the Federalists' and Anti-Federalists' debate over the formulation of the Bill of Rights. Justice Burger concluded, in a footnote, that James Madison's efforts to end the debate "culminate[d] in the Ninth Amendment, [and] served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others." *Id.* at 579, n.15. *See also supra* note 25.

EXPLORATION OF THE "OUTER LIMITS": THE MISDIRECTED EVOLUTION OF RECKLESS DISREGARD

JEROME S. KALUR*

> [A]s a matter of either practice or philosophy, I do not see how we can separate an issue as to what is believed from considerations as to what is believable.
>
> Mr. Justice Jackson, dissenting in *United States v. Ballard*, 322 U.S. 78, 92 (1944).

INTRODUCTION

The American common law of defamation evolved without first amendment free speech or expression limitations until 1964. Before that time, the states were free to formulate such tests for liability as they deemed appropriate. Generally, liability for defamatory statements[1] rested upon proof that a statement was of the kind to cause damage to reputation, was false, and had been published to a third party.[2] Once such a *prima facie* case had been made out, injury to reputation was presumed.[3] The United States Supreme Court had consistently refused to enter this area of largely settled tort law.[4]

The status quo was altered by the Court's landmark decision of *New York Times Co. v. Sullivan*.[5] With its decision in *New York Times*, the Court made defamation actions brought by public officials subject to a proof burden not previously required under tort law for libel and slander. This addition was deemed necessary because of the free speech and expression provisions of the first amendment.[6] Added to the actual falsity and proof of publication requirements of defamatory nature was the necessity that a plaintiff prove with convincing clarity that, at the time of publication, the defamer either knew the statement to be false or recklessly disregarded whether or not it was false.[7] As a consequence of the employment of the

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1. As defined in RESTATEMENT OF TORTS § 559 (1938), "[a] communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

2. *See* RESTATEMENT OF TORTS § 613 (1938).

3. This presumption arose when the defamatory statement was obvious or *per se*. When the language required explanation to comprehend a defamatory meaning in its context, it received the designation of *per quod* and damages were not presumed. See the discussion of the common law of defamation contained in Justice White's dissenting opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 369-76 (1974).

4. *See, e.g.*, Konigsberg v. State Bar of Calif., 366 U.S. 36, 49 (1961); Pennekamp v. Florida, 328 U.S. 331, 348 (1946).

5. 376 U.S. 254 (1964).

6. *Id.* at 279-80.

7. *Id.*

ephemeral term "reckless," the Supreme Court, with the appellate and trial courts following in its wake,[8] began the search for the "outer limits"[9] of what may constitute the reckless disregard[10] element of actual malice.[11]

This article traces the judicial gloss that has been placed upon the reckless disregard proof standard. It is argued that the *Garrison v. Louisiana* falsity definition,[12] and the subsequent *St. Amant v. Thompson* truth definition,[13] of reckless disregard incorrectly directed a search for evidence of a subjective and culpable mental state.[14] The emphasis, as shown in these two cases, upon the requirement of proving a publisher's state of mind "in fact"[15] has led to a continuing judicial struggle with the legal fictions of whether one

8. The lower courts' efforts to apply the holding in *New York Times* have been described as a problem in "how to reason by analogy." *See* Kalven, *The Reasonable Man and the First Amendment:* Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 278.

9. The Court first employed this term in St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968). The full statement reads:

> Inevitably [what constitutes reckless disregard's] outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law.

Id.

10. 376 U.S. at 280. The *New York Times* decision concerned defamation allegations against a public official. *Id.* at 279. The reckless disregard standard was expanded to "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1976); to invasion of privacy actions in Time, Inc. v. Hill, 376 U.S. 374, 390 (1967); and to punitive damages claims in so-called "private" plaintiff defamation cases in Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). While reckless disregard has been used in these different contexts, no definitional distinction based upon the claim for relief has occurred.

11. 376 U.S. at 280. The term "actual malice," as employed by the Court did not carry with it the common law concept of ill will or spite. *See* Henry v. Collins, 380 U.S. 356, 357 (1965); Garrison v. Louisiana, 379 U.S. 64, 66 (1964). The change in accepted meaning was not an easy one for the lower courts. "Although these definitions distort common English, they must be taken at face value." Reliance Ins. v. Barron's, 442 F. Supp. 1341, 1349 (S.D.N.Y. 1977). Justice Stewart would eventually come to "regret" the use of the term. *See* Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting). The statement of the actual malice rule reads in full as follows:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. at 279-80. Semantically, this statement implies that in the event a publisher is indifferent to determining the truth of the article or disregards that issue altogether, he would be culpable. Nevertheless, the Court's defining process as to the words "false or not," has exempted the neutral mental state and put a "premium on ignorance" by the "irresponsible publisher." *See* St. Amant v. Thompson, 390 U.S. at 731; Redick, *Freedom of the Press*, 49 CORNELL L.Q. 581, 600 (1964).

12. 379 U.S. 64, 74 (1964) ("Only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.").

13. 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.").

14. This mental state inquiry was foreshadowed in *New York Times* by reference to the "state of mind required for actual malice." 376 U.S. at 287. This inquiry was branded in a dissent by Justice Goldberg as an "elusive concept." *Id.* at 302 n.4.

15. 390 U.S. at 731. Typical of the judicial struggle over interpretation of these two words is a statement made by Rovira, J., dissenting in Kuhn v. Tribune Republican Pub. Co., 637 P.2d 315, 324 (Colo. 1981) ("Actual malice is not a proposition that can be supported by a normative conclusion that the publisher should have known of the falsity of the statement. Rather, evidence of the publisher's subjective awareness is required.").

may be subjectively "deemed" to have had,[16] or "should" have had,[17] or "could" have had[18] the required malicious state of mind.

Instead of a limited inquiry about uncertain assumptions[19] arising out of the countless subtleties of a defendant's mind,[20] the earlier decision of *New York Times* had offered a much different formula: proving that a defendant knew or should have known that the risk of falsity outweighed the social utility of publication to such an unwarranted degree as to make publication, under such a state of actual or constructive knowledge, an act of recklessness. It is the thesis of this article that those who publish with heedless indifference to truth or falsity should be objectively culpable under the *New York Times* reckless disregard standard and that the *Garrison-St. Amant* subjective awareness standard, which attempts to actually discern the state of mind of a defendant, should be overruled.

I. DEFINING RECKLESS DISREGARD

A. *The Initial Defining Process—Trial and Error*

1. *New York Times Co. v. Sullivan*

New York Times marked the first effort by the Court to strike a balance between the first amendment's guarantee of freedom of expression and the common law's remedy for damage to reputation.[21] In that case, a city commissioner of Montgomery, Alabama brought suit against the *New York Times* for publication of a paid advertisement describing the mistreatment of black students protesting segregation in the South. The Supreme Court reversed the verdict in favor of the plaintiff, prohibiting recovery unless there was proof that the newspaper had defamed the commissioner by virtue of a deliberate falsehood, or reckless disregard as to whether the advertisement was true or false.[22] The *New York Times* rule prohibited recovery unless there was proof that the defendant had defamed a person by virtue of a deliberate falsehood, or through reckless disregard as to whether the item published was true or false. This decision by the court represented an effort to shield the defamatory error from culpability, even if this error was committed negligently.[23] Such a shield was established in order to assure that freedom of expression is afforded the requisite "breathing space."[24]

16. *See, e.g.*, Dupler v. Mansfield Journal Co., Inc., 64 Ohio St. 2d 116, 123, n.5, 413 N.E.2d 1187, 1192, n.5 (1981). The suggested struggle is illustrated by the Ohio Supreme Court's impliedly contra ruling just eleven months later in Bukky v. Painesville Telegraph & Lake Geauga Printing Co., 68 Ohio St. 2d 45, 48, 428 N.E.2d 405, 407 (1981).

17. *See, e.g.*, Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238, 1259 (1980), *cert. denied*, 452 U.S. 962 (1981).

18. *See, e.g.*, Alioto v. Cowles Comm., Inc., 530 F. Supp. 1363, 1371 (N.D. Cal. 1981).

19. 418 U.S. 323, 353 (1974) (Blackmun, J., concurring).

20. DiLorenzo v. New York News, Inc., 78 A.D.2d 669, 671, 432 N.Y.S.2d 483, 485 (1980).

21. 376 U.S. at 299. "We must recognize that we are writing on a clean slate." (Goldberg, J., concurring).

22. 376 U.S. 256.

23. *Id.* at 271, 278. This conditional or qualified privilege is also referred to as protecting "honest misstatements." *Id.* at 282, n.21. *See also id.* at 288 ("The evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.").

24. *Id.* at 272.

While the phrase "knowledge of falsity" as stated in *New York Times* required little explanation, reckless disregard inherently bespoke a need for judicial interpretation on a case-by-case basis.[25] This interpretive process was initiated by the Supreme Court with a review of the *New York Times* trial record and a determination of whether the defendant's pre-publication knowledge could[26] support a jury finding of reckless disregard. The evidence selected for discussion related only to what employees of the *New York Times* knew before publication of the defamatory material.[27] This investigation disclosed that the defendant's employees believed the advertisement to be substantially correct,[28] that no evidence had been produced to impeach that claim, and that the defendant's belief in its correctness was based upon a *reasonable* factual basis.[29]

The *Times* references to a reasonable or good faith belief in the truth of what was published opened the door to evidentiary considerations of what demonstrated the reasonableness of such a conclusion. The pre-publication conduct of the publisher may be the subject of objective evidence[30] with respect to the defendant's reasonable[31] justification in holding a belief that assertions were true. Consequently, Justice Brennan's majority opinion turned to an analysis of the New York Times' conduct to determine if the claimed pre-publication belief in the truth of the article had been proven justifiable.[32] Looking to the content of the advertisement alone, and the failure of the *Times* to investigate its claims, the Court rejected the Alabama Supreme Court's conclusion that this conduct could be termed cavalier.[33] The Court stated that admissible evidence for a plaintiff attempting to prove knowledge of the risk of falsity was that form of testimony or exhibit which

25. St. Amant v. Thompson, 390 U.S. at 730. Significantly, the Court later rejected development of factual criteria on a case-by-case basis with respect to private-person libel actions, to which the *New York Times'* rule was deemed inapplicable. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 343 ("this approach would lead to unpredictable results and uncertain expectations"). The same statement could also be made for reckless disregard's case-by-case development.

26. 376 U.S. at 287.

27. *Id.* at 286.

28. *Id.*

29. It is important to note that the evidentiary review repeatedly characterized the basis for the *Times'* belief in the accuracy of its publication as a reasonable one. For instance, the Court stated: "that opinion was at least a *reasonable* one, and there was no evidence to impeach the witness' good faith in holding it." *Id.* at 286 (emphasis added). The Court also stated: "First, the letter written by the Times reflected a *reasonable* doubt on its part as to whether the advertisement could *reasonably* be taken to refer to respondent at all." *Id.* (emphasis added). The Court continued: "the distinction between respondent and the Governor was a *reasonable* one, the good faith of which was not impeached." *Id.* at 287 (emphasis added). Furthermore, "their failure to reject it on this ground was not *unreasonable*." *Id.* (emphasis added).

Despite these statements, the Court, less than eight months later, in Garrison v. Louisiana, 379 U.S. 64, 78-79 (1964), found a trial judge in error for holding a violation of "the reasonable belief standard" to be a basis for a finding of reckless disregard. This seemingly incredible reversal was made without reference to the *New York Times'* language, quoted above, and justified by Justice Brennan's belief that use of such a test was a "suggestion" that the "immunity from . . . responsibility . . . disappears on proof that the exercise of ordinary care would have revealed that the statement was false." *Id.* at 79.

30. This form of inquiry (as opposed to impeachment by direct evidence) has been used only in *New York Times*, 376 U.S. at 286-89 n.28.

31. *Id.* But *see id.* at 285 n.26.

32. *Id.* at 286.

33. *Id.*

demonstrated that the likelihood of falsity had been "brought home"[34] before publication. Given that it was "brought home," the evidence must also show that the likelihood of falsity was ignored or, if not ignored, so inadequately investigated that the claim of a belief in truth was not justified. The nature of the publication alone was rejected as capable of raising an inference as to the risk of falsity.[35] According to the Court, a failure to investigate entirely, or a failure to adequately investigate, would be subject to jury evaluation for recklessness only when the risk of falsity had been brought home to such a degree that the belief in truth was no longer justified.[36]

New York Times never reached the issue of state of mind analysis because no evidentiary basis to bring home the risk of falsity had been proven. As indicative of an honestly-held belief in the truth, the Court pointed to the Times' knowledge of the good reputation of many of the sponsors of the advertisement.[37] There was also a letter from a person known to the *Times* as a responsible individual certifying that the use of the listed names was authorized.[38] Lastly, the *Times* staff reviewed the article and found that it did not violate its policy against publishing advertising that contained personal attacks.[39] Based upon the circumstances, the Court concluded that it was uncontroverted that the *Times* had published with reasonable belief that the article was true.

2. *Garrison v. Louisiana*

The Court continued the process of defining and interpreting reckless disregard in *Garrison v. Louisiana*.[40] In *Garrison*, the District Attorney for New Orleans had conducted a press conference during which he accused eight judges of the parish of inefficiency, laziness and of taking excessive vacations. He was convicted of criminal defamation and appealed, attacking the constitutionality of the statute. The Supreme Court reversed his conviction, holding that false statements were constitutionally protected unless they were made with a high degree of awareness of their probable falsity.[41] While the *New York Times* decision had suggested that an awareness of the risk of falsehood might be "brought home" and under certain circumstances, without an adequate investigation, negate claims of good faith,[42] it had not addressed the question of whether a specific level of awareness of the risk of falsity must be proven[43] in order to demonstrate recklessness. While *Garrison*

34. *Id.* at 287. This statement sounds very similar to the "brought home" language adopted in RESTATEMENT (SECOND) OF TORTS § 587, comment c: "It is enough that he [the tortfeasor] knows or has reason to know of circumstances which would bring home to the realization of the ordinary reasonable man the highly dangerous character of his conduct."

35. 376 U.S. at 286.

36. *Id.* at 287. *See also* Redick, *supra* note 10, at 600 n.11.

37. 376 U.S. at 287.

38. *Id.*

39. *Id.*

40. 379 U.S. 64 (1964).

41. *Id.* at 66-67, 74.

42. 376 U.S. at 287.

43. *See* Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1735 (1979) ("When

did provide the yardstick of probability,[44] it also altered the standard for determining who would be culpable, as compared to what had been previously implied in *New York Times*.[45] Instead of a reasonable basis for believing in truth, the standard as stated in *Garrison* was now to be determined by the subjective mental belief of the defamer.[46]

Under the holding in *Garrison*, one is reckless when an erroneous publication is made with a pre-existing cognizance of the probability of falsity. In reaching this conclusion, the Court made reference to the "brought homestate of mind"[47] language of *New York Times*, but applied it only to what the defendant actually knew, and not as to what a reasonable person would have believed. By restricting proof of reckless disregard to that method only,[48] the *Garrison* majority ignored the defamer who is unaware of, or who does not care, whether the story is true or false. Such a person would have no justified basis for a subsequent claim of good faith. The *New York Times* rule had implied that this category of defamer could also be deemed reckless.[49]

While the person who is aware of a probability of falsity may appear as more malicious than the person who is without justification for a belief in truth, or seeks no justification, this is not always true. One may be aware of a probability of falsity, but decide to accept the risk of falsity because of the societal importance of publication.[50] Under such circumstances, at least truth or falsity has been considered and the risk evaluated. A jury might well decide that given the circumstances, the publication, even with a probability of falsity, was not reckless. On the other hand, those who publish with no valid basis for believing truth or who print it without regard to considerations of truth may be even more culpable. Yet, the latter group is freed of the possibility of a reckless designation by *Garrison*'s probable awareness formula.

The freeing of defamers who have a cavalier attitude toward the truth was made logically mandatory by the last portion of the *Garrison* opinion.[51] Justice Brennan appears to have confused a breach of ordinary care, negligence,[52] with the standard for measuring the breach of that duty, i.e. the conduct of a reasonably prudent man under the same or similar circum-

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the Court has formulated standards of journalistic care in the libel area, it has failed to address the evidentiary dimension of these standards.").

44. 379 U.S. at 74. The term probability inherently signals the concept of more likely than not or more than fifty percent. *See* Cooper v. Sisters of Charity, 27 Ohio St. 2d 242, 253, 272 N.E.2d 97, 100 (1971); Price v. Neyland, 320 F.2d 674, 678 (D.C. Cir. 1963).

45. *Garrison*, 379 U.S. at 74.

46. The Court states that culpability for reckless disregard may arise from "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* . . ." *Id.* The use of the word "only" limits proof of reckless disregard to those situations where the defendant actually perceived, as more likely than not, that what he was about to publish was false.

47. 376 U.S. at 280.

48. 379 U.S. at 74.

49. 376 U.S. at 279-80.

50. *See* RESTATEMENT (SECOND) OF TORTS § 500, comment a ("There may be exceptional circumstances which make it reasonable to adopt a course of conduct which involves a high degree of risk of serious harm to others.").

51. 379 U.S. at 78-79.

52. *Id.*

stances.[53] Because he believed reasonable men served as standards *only* in negligence situations, he held that standard inapplicable.[54] This eliminated the objective, reasonable person, standard for recklessness, and with it, its inherent risk versus social utility evaluation.[55] From that day, until the present, the tort concept of recklessness has not existed in libel cases. All that is left is a credibility evaluation based upon whether there was, or was not, a subjective awareness of probable falsity. This limited standard presents a potential plaintiff with an almost impossible proof burden.[56]

3. *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*

The *Garrison* modified definition of reckless disregard met its first major test in the companion cases of *Curtis Publishing Co. v. Butts*[57] and *Associated Press v. Walker*.[58] *Curtis Publishing* involved an article in the *Saturday Evening Post* which asserted that a college coach had conspired to "fix" a football game.[59] The second case, *Associated Press*, arose from a news dispatch which stated that a former army general had led the violent resistence to efforts by federal marshals to enforce a desegregation order at the University of Mississippi.[60]

The difficulty of attempting to divine a mental conclusory process was demonstrated quickly. Justice Harlan's plurality opinion disclosed that the *Saturday Evening Post* recognized the need to confirm an improbable story.[61] The story informant was of dubious background,[62] the editing function was not carried out properly,[63] inconsistencies were not checked[64] and confirmation was not obtained when it easily could have been through trained sports experts.[65] Publication under such an inadequate state of knowledge was termed by the Harlan plurality opinion as an "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[66]

Conversely, the record in *Associated Press* demonstrated "very little evi-

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53. *Id.*

54. *Id.* at 79.

55. RESTATEMENT (SECOND) OF TORTS § 282, comment e (" 'Negligence' excludes conduct which the actor does or should realize as involving a risk to others which is not merely in excess of its utility, but which is out of all proportion thereto and is therefore recklessly disregardful of the interests of others.").

56. Justice Douglas, dissenting from the denial of *certiorari* in Dunn & Bradstreet v. C.R. Grove, 404 U.S. 898, 898 (1971), noted that, "the actual malice test has been tightened by virtually eliminating reckless disregard as a component."

57. 388 U.S. 130 (1967).

58. *Id.*

59. *Id.* at 135.

60. *Id.* at 140.

61. *Id.* at 157. As a result, the *Curtis* discussion of what constitutes reckless disregard picks up where *New York Times* left off.

62. *Id.* at 157.

63. *Id.* at 158-59, 169-70.

64. *Id.*

65. *Id.*

66. *Id.* at 155. This was a lesser standard for the plaintiff than that enunciated in *New York Times* because the subject matter of the libel did not involve the affairs of government. *Id.* at 153-54.

dence relating to the preparation of the news dispatch."[67] The little evidence available, however, reasonably justified the decision to publish.[68]

Chief Justice Warren, however, believed Justice Harlan's references to extreme departure from investigation and reporting standards to be an unusual and speculative formulation.[69] Although the Chief Justice made similar references to the defendant's "slipshod and sketchy investigatory techniques",[70] and the *Post*'s "muckraking and exposé"[71] journalism style, he differed from Justice Harlan in his conviction that the *New York Times* holding was an adequate basis for disposing of *Curtis Publishing*. It is in this divergence of viewpoints that the fruit of *Garrison*'s underlying reasoning may be observed.

The source of controversy in *Curtis Publishing* was not how or whether to reason by analogy[72] from *New York Times*, but how to avoid application of *Garrison*'s mental state gloss. Only once in the four separate opinions which were written for these companion cases was reference made to recovery being permitted for reckless disregard only when there is proof of the publisher's knowledge of probable falsity.[73] And even on that singular occasion, Justice Harlan was distinguishing *Garrison* as a seditious libel action involving claims of calculated falsehood.[74] The plurality opinion then proceeded to avoid the issue entirely by adopting a less rigorous[75] standard applicable to non-governmental defamation.[76] Chief Justice Warren also sidestepped awareness of probable falsity, but in a different manner. Having rejected the Harlan less rigorous standard,[77] he found *New York Times* to permit a determination of reckless disregard measureable by the publisher's conduct.[78] No mention was made of the *Garrison* mental state analysis. Justice Brennan's concurring and dissenting opinion continued on the same avoidance course.[79]

It was obvious that the investigation methods of the *Post* were found, both by the jury and the Court, to border on outrageous conduct. The trial

67. *Id.* at 159.

68. *Id.* at 158-59, 165. Justice Harlan, for the plurality, Chief Justice Warren, in his separate opinion, and Justice Brennan, in his separate opinion, all agreed that *New York Times* provided adequate guidance to decide *Associated Press v. Walker*. The decision of the Associated Press to publish was based upon a justified belief in the story's accuracy and therefore privileged by the first amendment. The story itself was not "unreasonable" and the surrounding facts did not bring home any substantial risk of falsity.

69. *Id.* at 163.

70. *Id.* at 169.

71. *Id.*

72. Professor Kalven was of the belief that nothing more was involved. *See* Kalven, *supra* note 8, at 178.

73. 388 U.S. at 153.

74. *Id.*

75. *Id.* at 155.

76. *Id.* at 154.

77. *Id.* at 163.

78. *Id.* at 164. If one's conduct is the determinant of recklessness, then that conduct, to be judged, must be compared to a standard. Even if it is said that the conduct might manifest an awareness of falsity which may be imputed to the defendant, the question remains: to whom is it made manifest? The standard for such a determination must be the proverbial reasonably prudent man. Thus, while the Chief Justice's opinion was consistent with *New York Times*, it was inconsistent with *Garrison*, which rejects the reasonable man test.

79. *Id.* at 173-74.

record made it equally obvious that no evidence had been presented to indicate that the *Post* was aware of the probability of falsity. Given these two imperatives, the subjective awareness criteria of *Garrison* had to be ignored or overruled. The failure to take the latter course left the Court open to criticism for inconsistency[80] and continued to leave open the resolution of what specific circumstances constitute actual malice.[81]

B. *The Watershed*—St. Amant v. Thompson

The 1968 decision in *St. Amant v. Thompson*[82] was devoted to the singular question of what may constitute reckless disregard for the truth or falsity of assertions contained in a publication. St. Amant, a candidate for political office, had made a televised speech in which he charged his opponent, a labor union official, and Thompson, a deputy sheriff, with criminal conduct.[83] St. Amant had obtained an affidavit from an informant who was known to him to be in a knowledgeable position within a labor union.[84] The affidavit included defamatory charges which were determined at trial to be false as to Thompson.[85] St. Amant did not investigate the accuracy of his informant's charges before publishing the contents of the affidavit,[86] and he justified his failure to investigate by maintaining that there was no cause to suspect that the charges were false.[87]

In rejecting a claim of a duty to investigate merely because a story is defamatory,[88] the Court's opinion acknowledged the possibility of encouraging irresponsibility and putting a "premium on ignorance."[89] The Court justified this position by once again stating that the test was not what a reasonably prudent man would do in the exercise of ordinary care.[90] The Court focused instead upon the concept of mental awareness. The qualified privilege which a publisher enjoys may be lost when the publisher is *knowingly* indifferent to his own doubts. According to the Court in *St. Amant*, "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[91]

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80. Justice Black's dissent makes the point forcefully:

> If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us.

Id. at 171.

81. Note, Times *Marches On: The Courts' Continuing Expansion of the Application of the "Actual Malice" Standard*, 47 NOTRE DAME LAW. 153, 160 (1971).

82. 390 U.S. 727 (1968).

83. *Id.* at 728.

84. *Id.* at 733.

85. *Id.* at 730.

86. *Id.* at 733.

87. *Id.* Justice White's majority opinion justifies a conclusion of no awareness of probable falsity by reference to facts which would justify a reasonably prudent man in believing his publication to be true, e.g. St. Amant had met his source nine months before in connection with union activities; the information supplied was under oath; and the informant agreed to stand behind his story at personal risk to himself. *Id.*

88. The Court rejected inferences of recklessness as "colorless." *Id.* at 733.

89. *Id.* at 731.

90. *Id.* at 731-32.

91. *Id.* at 731.

Despite the importance such a subjective test places upon a defendant's own testimony that he had no serious doubts, the *St. Amant* opinion offered circumstantial proof alternatives.[92] Specific examples were afforded as to what acts or omissions would support a finding that the defendant did, in fact, publish in bad faith.[93] Defendant's claims of good faith (no serious doubts as to truth) would not likely prove to be persuasive[94] where the evidence disclosed: 1) a story fabricated or imagined; 2) a story based wholly on anonymous and unverified sources; 3) obvious reasons to doubt the truthfulness of an informant or his accuracy; or 4) a story, "so inherently improbable that only a reckless man would put [it] in circulation."[95] These examples were offered to prove objective evidence of a subjectively malicious state of mind.[96] Stated differently, pre-publication conduct could be circumstantial evidence through which to judge the credibility of the defendant's claim that he had not abused his qualified privilege.

While the *St. Amant* decision was intended to afford "meaningful guidance" in defining reckless disregard, its logical inconsistencies, born of *Garrison*, made that result impossible. First among the contradictions is the unexplained adoption of the serious doubt test. Since the word "probable" is omitted from the serious doubt formulation, it might be concluded that doubts as to verity which did not reach fifty percent[97] were being included as indicative of recklessness. Yet, this conclusion proves unwarranted because the Court concluded that the evidence offered did not prove that St. Amant was aware of probable falsity.[98] Thus, although the words used in the doubt test appear less exacting, their meaning is the same: either doubts as to truth or awareness of falsity must subjectively rise to the level of a "probability" before liability is possible.

While Justice White speaks of "reckless conduct" in *St. Amant*,[99] the harbinger of liability is a mental conclusion as to truth or falsity. At the same time, prepublication conduct is probative in order to determine if the testimony as to mental conclusion is true. The finder of fact does not decide if conduct is indicative of an abuse of the first amendment's qualified privilege; instead, he decides if the conclusion made after the acts or omissions occurred is truthfully reported. The decision affords no explanation regarding why there was no decision that the publication conduct was or was not reckless.

Under the reasoning of *St. Amant*, the trier of fact may hear evidence of examples of inappropriate conduct, but those examples may not be used to

92. *Id.* at 732. ("The defendant . . . cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.").

93. *Id.*

94. *Id.*

95. *Id.* The "inherently improbable" criterion has been referred to as a catch-all category. *See*, Note, *A Clarification of the Actual Malice Test*, 47 N.C. L. REV. 471, 475 (1969).

96. *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 238 (1976).

97. *See supra* note 42.

98. 390 U.S. at 732.

99. *Id.* at 731.

determine that the defamer should have had serious doubts. Such a conclusion would require a standard of comparison to the reasonably prudent man.[100] The evidentiary inferences that arise must only be used to test the defendant's credibility.[101] Despite its ban on judgments based on reasonableness, the *St. Amant* opinion lists the reasons why St. Amant's publication was made with a reasonably justified belief in its accuracy, thereby negating any need for further investigation.[102]

The post-*St. Amant* evolution of reckless disregard was not indicative of an area of settled principles. Determining the credibility of a claimed mental state proved to be an elusive proposition,[103] which was further compounded when the standard was not restricted to defamation occurring in the public or governmental area.[104] In addition, the concept of judgment based upon an objective standard of care had to be rejected again and again.[105]

The mental element proved particularly difficult when the issue became the reporting of what someone else *said*, rather than what he did.[106] If language was left out or added to, did this reveal, in itself, serious doubt as to the truth of the published story? The Court's answer was a qualified no. If the defendant honestly believed that his editing caused the true meaning of the speaker's remarks to be revealed, serious doubts, and therefore reckless disregard, did not exist.[107] If the editing was done with the intent to distort and falsify, the reporter's claim of good faith could not stand.[108] The Court did acknowledge, however, that the esoteric nuances of these mental decisions were not always easy to ascertain.[109]

It is reasonable to suspect that the near or actual impossibility of divining the motivation behind such esoteric conclusions contributed to a refusal of a majority of the Court to extend the *New York Times* rule to all defamation actions involving public issues. Justice Harlan, dissenting in *Rosenbloom v. Metromedia, Inc.*,[110] came closest to acknowledging this difficulty when he charged the Brennan plurality opinion with having an "inadequate appreciation of the limitations imposed by the legal process in accomodating the tension between state libel laws and the federal constitutional protection given to freedom of speech and press."[111]

100. Again, the Court was under the belief that the reasonable man only determines what is ordinary care under the circumstances. *See supra* note 29.

101. 390 U.S. at 732.

102. *Id.* at 733.

103. *See* Greenbelt Coop. Publication Ass'n, Inc. v. Bresler, 398 U.S. 6, 10 n.3 (1970).

104. The *Curtis Publishing* plurality distinction for non-governmental defamation did not survive as a distinct entity but was merged into the mutated *New York Times* standard. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971).

105. *Id.* at 276.

106. *See* Time, Inc. v. Pape, 401 U.S. 279 (1971).

107. *Id.* at 289.

108. *Id.* at 292. While *interpretation* was proper, deliberate *distortion* with false intent was improper. The rationale is that one can be aware of the probability of falsity in the latter instance.

109. Monitor Patriot, Co. v. Roy, 401 U.S. at 276.

110. 403 U.S. at 62 (1971).

111. *Id.*

In *Herbert v. Lando*,[112] the Court was confronted with one of the necessary consequences of having directed the ultimate issue of reckless disregard to the mental attitude of the defamer: discovery of the defendant's thoughts and reasoning process would be a prime concern of plaintiffs seeking to prove awareness of probable falsity by direct evidence. During the course of sanctioning such inquiries,[113] the Court had occasion to review the requirement that a finding of reckless disregard for truth or falsity hinges upon a determination as to the defendant's state of mind.[114]

Justice White's majority opinion in *Herbert* summarized the *New York Times* rule as an attempt to discourage "erroneous information known to be false or probably false."[115] No reason is given as to why the subjective decisional level is placed at a probability.[116] Also ignored by the "reason to suspect" alteration is its objective implications. Deciding whether someone was consciously aware of a probability implies a much more focused inquiry on what the defamer was thinking than does the new wording "reason to suspect." Determining what a defamer had reason to suspect rests much more heavily on what information was available and what a person of normal intelligence and experience would suspect based on that information.

C. *The Limited Alternative—Outrageous Publications*

While the *Curtis Publishing* plurality standard of care did not survive,[117] its finding of liability as a reaction to slipshod journalism did. Typical of such cases is *Goldwater v. Ginzburg*.[118] The defendants maintained their good faith in publishing a "psychological" analysis of presidential candidate Barry Goldwater.[119] Although there was evidence that the publishers may have known their publication contained fabrications,[120] the appellate opinion focused upon investigative omissions and what they signified.[121] Charges of mental illness were deemed "inherently improbable" based upon the investigative material available.[122] Consequently, a thorough investiga-

112. 441 U.S. 153 (1979).

113. The Court stated:

> It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to know or suspect that their damaging publication was in error.

Id. at 160.

114. *Id.* at 158-62.

115. *Id.* at 172.

116. Justice White's statement of "probably false" appears inconsistent with his earlier reference to culpability when the defamer "had reason . . . to suspect . . . error." *Id.* at 160. The only way to rationalize this inconsistency is to assume that the doubt which gives rise to the suspicion must be one that rises to at least the level of more likely than not. Justice White later refers to the degree of awareness as "strongly suspected." *Id.* at 172.

117. Monitor Patriot, Co. v. Roy, 401 U.S. at 271.

118. 414 F.2d 324 (2d Cir. 1969).

119. *Id.* at 331.

120. *Id.* at 332.

121. *Id.* at 329, 334.

122. *Id.* at 337 (publication upon the facts known and knowable by a "reasonable" investigation were deemed to create an inference of a preconceived plan to publish without regard to truth or falsity).

tion to serve as a reasonable check upon the truth was required.[123]

Following the description of the defendant's careless investigation, the Second Circuit opinion recognized that the separate items of carelessness, while alone indicative only of negligence, cumulatively presented an issue of recklessness.[124] The message was that selective reporting (whatever the subjective and honestly-held belief of the defendant) designed to lend credence to a predetermined result is determinable objectively as reckless disregard.[125] On this basis, and without regard to proof of actual awareness of probable falsity, the judgment for the plaintiff was affirmed.[126]

II. THE PROBLEM CREATED BY THE DEFINITION

A. *Identification of the Problem*

The continuing need for factual reviews of libel judgments was a symptom that easily applied principles had not evolved out of *New York Times* and its progeny. In the first seven years after the decision, the Court attempted to strike an appropriate balance on a case by case basis[127] no less than sixteen times. The subsequent decline in review of cases involving claims of reckless disregard appears to be due more to the denials of certiorari[128] than to any decline in the volume of cases. As will be discussed, these cases exhibit Justice Stewart's unstated misapprehensions[129] as to what constitutes valid evidence of reckless disregard.

Perhaps no single case better exemplifies the difficulty of attempting to apply the *Garrison-St. Amant* awareness-in-fact concept as does *Alioto v. Cowles Communications, Inc.*[130] Spanning almost eleven years, four trials, two appellate decisions, and two denials of certiorari, it is a prime example of the problem of attempting to prove a subjective mental state through objective

123. *Id.* at 339.

124. The full statement reads:

> *Times* does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of ultimate fact, certainly a situation not intended by the Supreme Court.

Id. at 343.

125. *See also* Airlie Foundation, Inc. v. Evening Star, 337 F. Supp. 421, 424 n.9 (D.D.C. 1972).

126. 414 F.2d at 339. The charge to the jury predicated a finding of reckless disregard upon proof of heedless indifference to truth or falsity. *Goldwater* has been referred to as modifying the *Times* test to include recovery based not upon state of mind, but upon the "outrageousness" of the defendant's conduct. *See* Note, *The* New York Times *Rule: An Analysis of Its Application*, 55 MINN. L. REV. 299, 317 (1970). Rather than a modification, *Goldwater* may have been a return to the tort concept inherent in recklessness and recognized in *New York Times*. *See supra* note 29.

127. Dunn & Bradstreet, Inc. v. Grove, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting from a denial of *certiorari*).

128. During the 1980-1981 term, the Court declined to accept review of any of the twenty libel cases for which petitions for *certiorari* were filed. 7 Med. L. Rptr., Decisions (BNA) (1981).

129. *See* Herbert v. Lando, 441 U.S. at 199.

130. 430 F. Supp. 1363 (N.D. Cal. 1977), *aff'd* 623 F.2d 616 (9th Cir. 1980).

evidence. The lawsuit was the result of a *Look Magazine* article which asserted that San Francisco's mayor, Joseph Alioto, had extensive financial dealings with organized crime figures.[131] The hearsay report of such dealings was rendered by a source of questionable background[132] and based upon the purported statements of a person who was never interviewed. Attempts to confirm Alioto's presence at a critical meeting were fruitless, although at least one of the alleged participants was interviewed but not asked about the meeting.[133] Alioto admitted knowing several of the alleged participants but was never asked if a meeting occurred.[134] The defendants maintained throughout that they honestly believed their informant's story and had no serious doubt as to its truth at the time of publication.[135]

The first *Alioto* trial ended in a hung jury. The second trial also resulted in a hung jury, although the jury did agree that the reported meeting to arrange underworld financing was defamatory and false.[136] After the second trial, the trial judge acknowledged that the jury indecision was caused by an inability to agree upon whether reckless disregard of the truth had been proven.[137] The trial court's subsequent granting of judgment notwithstanding the verdict for the defendant was reversed by the Ninth Circuit after an extensive factual review and a finding that the evidence could permit a finding of reckless disregard.[138] After yet a third trial and another hung jury, both sides waived a fourth jury.[139] Finally, after four trials, judgment was rendered for the plaintiff,[140] the judgment was affirmed by the Tenth Circuit and, certiorari was denied by the Supreme Court.

It is most probable that the second and third juries could not agree upon whether the defendants had serious doubts *in fact*. The evidence did offer sufficient support of the defendant's claims of an honestly-held belief in the truth of what was printed so as to rule out fabrication.[141] It is not difficult to conceive of the jurors being convinced that any reasonable man would have had serious doubts, but not being able to conclude that these particular defendants had serious doubts. Under these conflicting infer-

131. 623 F.2d at 617.

132. The reports of improper activities were repeated statements of another individual. Judge Schwarzer noted that almost nothing was known about the background of the informant, while the person whose alleged statements were repeated, was known as a "notorious hoodlum" and "liar." 430 F. Supp. at 1370.

133. *Id.* at 1371.

134. *Id.*

135. *Id.* at 1370. The defendants obtained information from law enforcement authorities that a series of loans had been made by a bank where the plaintiff served as chairman of the board. *Id.* at 1366. These loans had been made to the underworld figure whose statements about the meetings were subsequently repeated. *Id.* at 1366-67. This fact and others obtained by the reporters gave at least a strong circumstantial rationale for their belief that they were reporting what had in fact occurred. The trial court found, however, that "[a] leap from this information to the charge of a nighttime cabal with major hoodlums to provide the financial where-withal for underworld business activities is too great to be performed without obvious reasons for doubt." *Id.* at 1370-71.

136. The case history is set out in 623 F.2d at 617-18.

137. 519 F.2d at 779-80.

138. *Id.* at 781.

139. 430 F. Supp. at 1365.

140. General damages were awarded in the amount of $350,000. *Id.* at 1372.

141. *Id.* at 1365.

ences, and the natural desire not to exculpate those who cause damage to reputation, a hung jury was not a surprising result.

The opinion written after the fourth trial, while couched in the language of determining a subjective state of mind,[142] phrases the ultimate finding of reckless disregard in objective terms: "[the author's] belief could not have been held in good faith."[143] This conclusion illustrates the consistent difficulty that has pervaded the efforts of the lower courts to deal with the subjective state of mind concept. This finding in *Alioto* is based upon what could or should have been concluded, and not upon what was believed. For purposes of analysis, the cases most illustrative of this contradiction and misapplication are best reviewed under the *St. Amant* objective evidentiary examples.

1. Fabrication or Fictionalization

Proof that a defendant made up a defamatory and false statement does not, in and of itself, demonstrate reckless disregard.[144] It must also be demonstrated that the fabricated statement had no reasonably supportive[145] factual background. A defendant may not be liable if he can demonstrate that, although he did not have information that a particular event occurred, he did not have serious doubts that it did occur, based on his state of knowledge as to other events and causes of conduct preceeding his speculative account.[146]

An example of these arguments in conflict is afforded by *Varnish v. Best Medium Publishing Co.*[147] The defendant had written a story giving reasons for the suicide of the plaintiff's wife. His conclusions regarding her mental outlook were not supported by any factual evidence.[148] On the other hand, the information obtained from the defendant's investigation *could* have been interpreted (without intent of falsity) to suggest a view not consistent with an awareness of falsity.[149] Apparently ignoring these issues, the Second Circuit found the defendant's fabrication sufficient to justify a jury finding of recklessness because the author's "presumption" had no basis in fact.[150]

142. *Id.* at 1371.

143. *Id.* The essence of such a finding is that given the existing state of knowledge, no reasonable person would not have had serious doubts as to the truth. The first court of appeals opinion used much the same language: "the authors must have had doubts about the veracity of [the informant]." 519 F.2d at 780.

144. Beckley Newspaper Inc. v. Hanks, 389 U.S. 81 (1967).

145. Guam Fed. of Teachers Local 1581 v. Ysrael, 492 F.2d 438, 439 (9th Cir. 1974).

146. *See* Oliver v. Village Voice, Inc., 417 F. Supp. 235, 238 (S.D.N.Y. 1976). ("To establish recklessness, it is not sufficient to show that the reporting in question was speculative or even sloppy."). *But see* Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976) (fabricating facts upon speculation requires a finding of serious doubt).

147. 405 F.2d 608 (2d Cir. 1968).

148. *Id.* at 612.

149. *See* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967) and Time, Inc. v. Pape, 401 U.S. 279, 283 (1971).

150. The decisive factor in the court's decision is an indifference to truth resulting in a finding of recklessness. The state of mind of the defendant played little or no part in that determination. 405 F.2d at 612-13. For a similar reasoning process, see Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 949, 120 Cal. Rptr. 186, 193 (1975).

2. Obvious Reasons to Doubt the Informant or the Inherently Improbable Tale

The threshold question when referring to "obvious reasons to doubt or inherent improbability" is: obvious or improbable to whom? Under the *Garrison-St. Amant* definition, one would expect the only inquiry to be whether the defendant found the informant or the story to be of doubtful validity. Whether the story *should* have been improbable to him would seem to be irrelevent.[151] But is it really possible to separate considerations of what is believed from what is believable? Is the scienter requirement applied when the plaintiff demonstrates by circumstantial evidence that the informant or his story yielded objective reasons to suspect untruth? The answer to these questions is often inseparable from the question of the appropriateness of the investigation conducted in the face of doubtful informants or stories. Accordingly, both topics must receive attention when examining the representative decisions.

In *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*,[152] the defendant ran a story involving charges of CIA involvement in the plaintiff's activities.[153] After the initial publication of the charges, the defendant received CIA denials which left it questioning the truthfulness of its printed story.[154] Nevertheless, follow-up stories failed to state specifically that the CIA had denied the truthfulness of the story.[155] The defendant's attempt to justify its equivocal statements as "reasonable" was summarily rejected by the court: "Viewed objectively this treatment portrayed the existing situation in an extremely misleading fashion."[156]

The basis for the *Airlie* court's finding of reckless disregard is the evidence of "selective reporting"[157] designed to reach a preconceived result.[158] This conclusion suggests that an investigation must have as its goal the resolution of the doubts that prompted it, and not simply gaining support for the improbable or questionable story. If the story, and not truth, is the goal, the defendant may be found to be reckless. When passing upon the selective reporting claims, the jury was instructed in *Airlie* that it could decide when and, by implication, what amount of investigation was justified under the

151. Although this conclusion flows logically from the "in fact" language of St. Amant v. Thompson, 390 U.S. 727, 731 (1968), that same opinion refers to a "reckless man" as putting inherently improbable stories into circulation. *Id.* at 732. The use of the unreasonably imprudent man as an objective standard is thereby sanctioned in direct contradiction to the earlier "in fact" subjective standard.

152. 337 F. Supp. 421 (D.D.C. 1972).

153. The essence of the claims made was that plaintiff's activities were financed by the Central Intelligence Agency and consequently the goals served were not those claimed by plaintiffs but those of the CIA. *Id.* at 423.

154. *Id.* at 425 n.10.

155. *Id.* at 426.

156. *Id.*

157. *Id.* at 429.

158. *Id.* In order to bolster its informant's story, the defendant "omitted matters known to it which would have detracted from the charge or at least presented it in a more balanced fashion, that it added details, some of which it knew to be false, which tended to lend credence to the charge. . . ."

circumstances.[159] In essence, the jury was allowed to pass objective judgment upon what should have been done to investigate the story where there were obvious reasons to doubt accuracy. If the investigation fell short of what was reasonable, the defendant was reckless.

Caught in a quandry, some courts have tried to decide both objectively and subjectively. In *Brewer v. Memphis Publishing Co.*,[160] after *three* jury trials all resulting in verdicts for the plaintiff, the Fifth Circuit reversed, holding the evidence incapable of establishing reckless disregard of truth or falsity.[161] The information giving rise to the allegedly libelous story was received from an informant who had heard the story from another.[162] The subsequent headlines and the published story were admitted surmises based upon investigation of the plaintiff's history and the hearsay information.[163] The investigation supplied no direct factual confirmation for the defamatory items in the story.[164] The *Brewer* factual analysis devoted itself to evaluating the reasonableness of the reporter's investigatory conclusions. Having done so, the appellate court decided that the defendants *neither* "entertained serious doubt, [nor] reasonably should have, about the story's accuracy."[165]

These illustrative cases demonstrate the difficulty in logical and evidentiary application of the subjective state of mind requirement of *Garrison-St. Amant*. The cases also exhibit an inconsistency of result and a lack of predictability.[166] Such results are indicative of judgmental standards which do

159. 337 F. Supp. at 429.

160. 626 F.2d 1238 (5th Cir. 1980).

161. *Id.* at 1259.

162. Nothing was known about the underlying informant's reputation, although the Fifth Circuit appears to determine that there is a presumption of truthfulness when the underlying informant is a "friend" of the direct informant and no affirmative reason for disbelief exists. *Id.* at 1258. The underlying informant was apparently never interviewed. *Id.*

163. *Id.* at 1258-59.

164. *Id.*

165. *Id.* at 1259. The reference to the objective "or should have" is not explained explicitly. Some insight into the reasoning process is found in the dismissal of the claim that reliance upon an unknown source of information was reckless. This conclusion is justified by a comparative reference (*Id.* at 1259): "We certainly ought not to require of the press the degree of reliability that we must require of the police when several informer links provide them with information on which they seek a search warrant." A lesser standard of certainty as to truth, below probability, is thereby suggested.

166. Outcome determination appears to be decided by the emphasis that a court places on the "in fact" requirement as opposed to ignoring it in the face of sloppy reporting which may be demonstrated objectively. Examples of cases adhering to the subjective requirement are: Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1027 (5th Cir. 1975) (defendant's choice of whom to believe from sources he believed reliable, despite conflicting information from other sources, did not create jury issue over high degree of awareness); Wolston v. Reader's Digest Ass'n., Inc., 429 F. Supp. 167, 179 (D.D.C. 1977) (defendant's "attitude" of belief in truth of one source furnished adequate basis for no question of serious doubt); Time, Inc. v. McLaney, 406 F.2d 565, 572-73 (5th Cir. 1969) (the jury may not infer inherent improbability where the defendant was not aware of "contra-indication" as to conclusions which were published); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161, 173 (1975) (although the information available would have seemed inherently improbable if viewed objectively, there can be no liability because the defendant did not so view the information); and Buckley v. Painesville Telegraph & Lake Geauga Printing Co., 68 Ohio St. 2d 45, 50, 428 N.E.2d 405 (1981) (defendant's claims of good faith warranted summary judgment despite 169 deposition answers indicating lack of knowledge as to reliability of sources, manner of investigation, and verification).

Cases substantially ignoring the subjective awareness formula are: Church of Scientology of Cal. v. Dell Publishing Co., 362 F. Supp. 767, 770 (N.D. Cal. 1973) (once sources are ques-

not pass the crucible test of practical evidentiary situations.

III. ADOPTING AN OBJECTIVE TEST FOR RECKLESS DISREGARD

A. *The Unreasonably Imprudent Man: An Appropriate Standard for Judging Reckless Disregard*

The United States Supreme Court consistently has refused to permit a judgment of libel regarding a publication decision based upon what a reasonably prudent person would have done under the same or similar circumstances.[167] A defamer's attitude toward truth or falsity may not be decided by what the jury believes was a proper, reasonable response to the information available. Instead, the decision is an affirmative or negative response to the defamer's testimony that he had no serious doubts as to the truth or that he had no reason to suspect probable falsity. Since the *New York Times* standard is founded upon an attitude of recklessness toward truth or falsity, as opposed to the lower fault concept of negligence,[168] the *Goldwater* court has deemed these references to what a reasonably prudent publisher would, or should, have done if acting under the proper attitude, to be inappropriate.[169] This prohibition appears to be ill-founded.

Negligence and recklessness are nothing more than successive degrees of cognitive fault. Negligence is conduct which falls below the ordinary care that should be exercised by a reasonably prudent man under the same or similar circumstances. Because it falls below the level of ordinary care, it creates a risk of harm to others that is considered to be unreasonable and thus culpable. Recklessness includes negligence but represents a higher degree of actual or imputed acceptance of unreasonable risk.[170] As the risk of harm rises, the social utility of the conduct decreases.[171] Because this increasing disproportion is, or should become known, and because acts in spite of it are the assumption of an unreasonable risk, the decision to take the risk is termed "indifference."[172] The vantage point for assessing reckless disregard of the risk disproportion therefore must be objective. In the event that

tioned, good faith to be measured by the reasonableness of investigation conducted); Akins v. Altus Newspapers, Inc., 609 P.2d 1263, 1266 (Okla. 1977) (defendant's conduct is determinative of whether heedless indifference to truth or falsity existed); Durso v. Lyle Stuart, Inc., 33 Ill. App. 3d 300, 337 N.E.2d 443, 447 (1975) (those who publish an exposé book must thoroughly investigate allegations before publication); and DeLorenzo v. New York News, Inc., 78 A.D.2d 669, 671, 432 N.Y.S.2d 483, 485 (1980) (the conduct and underlying circumstances revealed by investigation may negate good faith claims).

167. 379 U.S. at 79.

168. *Id.*

169. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969). *See also* RESTATEMENT (SECOND) OF TORTS § 500, comment a (1965) ("To be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent.").

170. *See supra* note 165.

171. RESTATEMENT (SECOND) OF TORTS § 500, comment a (1965). ("So too, there may be occasions in which action which would ordinarily involve so high a degree of danger as to be reckless may be better than no action at all, and therefore both reasonable and permissible.").

172. The term was used in RESTATEMENT OF TORTS § 1068 (Tent. Draft No. 13, 1936). The language of this section may have been consulted for the *New York Times'* actual malice rule. *See* Herbert v. Lando, 441 U.S. 153, 167 n.17 (1979). Section 1068 stated that one is liable

the focus of inquiry is permitted to be upon the defendant's appreciation of the risk disproportion only, society loses its ability to place a value judgment upon the conduct of one of its members. Subjective risk appreciation inquiry results in culpability only when the jury decides against the credibility of a defendant. Under such limits, no value judgment is made upon the state of knowledge of a defamer and his conduct based upon that knowledge. In the process, the basic fault concept of recklessness is lost.

The reckless disregard portion of the rule[173] was the result of a hybrid formed from the common law's qualified privilege regarding comments concerning public officials and the constitutional requirements of free expression.[174] The "like rule,"[175] from which the qualified privilege was drawn, was set forth in the Kansas Supreme Court decision in *Coleman v. MacLennan*.[176] That decision placed upon a defamation defendant the burden of proving his right to a qualified privilege.[177] The burden would be carried only when it was demonstrated that: 1) the publication was made to serve a public concern or need;[178] and 2) that the defendant had formed an honest belief (based upon all reasonable effort) as to the truth of what was published.[179] As a result of this proof burden, the objective review function of the jury, under claims of the public official privilege, had become so accepted that the *Restatement of Torts*[180] declared that one who claimed the qualified privilege, without "reasonable grounds for so believing," was not entitled to its protection even if he honestly and in fact believed the publication to be true. There was no premium on unsupported defamatory statements.

New York Times did not change substantially the public official qualified privilege. Because of first amendment imperatives, the defendant could have a *presumption* of a reasonable and good-faith-truth basis for publication, simply by claiming it.[181] Liability for abuse of the qualified privilege exists only through proof of knowledge of falsity or reckless disregard for whether the story was false or not.[182] Relevant evidence to prove such abuse had to

for punitive damages for libel when: "the defamatory matter was published with knowledge of its falsity or if it was published in reckless indifference to its truth or falsity."

173. The adoption of the proof standard also encompassed a change in the burden of proof. *See infra* note 177.

174. *New York Times*, 376 U.S. at 271. "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker."

175. *Id.* at 280.

176. 78 Kan. 711, 98 P. 281 (1908).

177. The Kansas Supreme Court approved a jury charge explaining the defendant's burden when asserting an "honest belief in the truth": "If you believe then from the evidence . . . that the defendant made all reasonable effort to ascertain the facts before publishing the same, and that the whole thing was done in good faith . . . your verdict must be for the defendant. . . ." 98 P. at 282.

178. *Id.* at 293.

179. *Id.* at 282.

180. RESTATEMENT OF TORTS, § 601 (1938). This rule still applies to private libel actions, at least for compensatory damage. *See, e.g.*, O'Berman v. Dunn & Bradstreet, Inc., 460 F.2d 1381, 1385 (7th Cir. 1972), and Brown v. Skaggs—Albertson's Properties, Inc., 563 F.2d 983, 986-87 (10th Cir. 1977).

181. 376 U.S. at 279.

182. *Id.*

be directed to a showing of an unreasonable or imprudent assumption of truth based upon the known and properly knowable facts.[183]

This objective formula of abuse determination was not meant to be modified by the Court's reference to the defendant's "state of mind."[184] In the context of its use, the term applied to the mere existence of information contra to what was published as not determining an unreasonable belief in the truth of what was published.[185] It should be the jury that determines what extent of belief confirmation was required. The subsequent *Garrison* determination that "state of mind" meant *conscious* awareness of probable falsity substantially alters *New York Times* by permitting a defamer to have no concern for truth or to avoid evaluation of the truth conclusion if made. If he publishes without thought to truthfulness, he does not have a state of mind toward truth and, indeed, is not required to have one. It is only if the defamer actually thinks about truth and finds the statement to be probably false that a jury is permitted to reach a verdict.

The conjunction of the presumption of a reasonable basis for believing the publication to be accurate, and the necessity that recklessness be proven only by evidence of the defendant's negative conclusion as to truth seemingly provided for exclusion of the reasonably prudent man standard. Nevertheless, it is questionable if this really occurs when the attempts to define state of mind are made, as they almost always are,[186] by circumstantial evidence. When these avenues of proving reckless disregard are examined, they reveal a contradictory result: they permit a finding of bad faith only by an imputed finding of unreasonable conduct. For example, if the plaintiff's evidence reveals that the primary source for a story had prior convictions for perjury and his story was deemed by knowledgeable sources to be questionable, what has been proven regarding the defamer's state of mind with regard to such a knowledge status? Two inferences have been created: 1) that no reasonably prudent person would have published without having serious doubts as to the story's truthfulness; and/or 2) that the defendant *must* have had serious doubts as to the truth. The conclusions embodied in both inferences are irrelevant if the only evidentiary goal is to demonstrate a subjective state of mind. Obviously, these circumstantially founded conclusions about what should have been believed do not tell us if the defamer actually thought a statement to be free of serious doubts as to its truthfulness. Yet, that is what is required of the fact finder in passing upon the "in fact" credibility issue.

It simply does not follow that the mental decision process, gathering together impressions, historical analysis, and experience factors can be exposed or defined by circumstantial evidence. This is because the aim of such evidence is not to demonstrate a mental state, but to prove a state of knowledge that was available to the defendant for him to accept, reject, miscon-

183. The *New York Times* plaintiffs were not given a second trial because the evidence could not justify an interference of unreasonable imprudence. *Id.* at 286-88.

184. *Id.* at 287.

185. *Id.*

186. St. Amant v. Thompson, 390 U.S. at 729.

strue, ignore, or develop further by investigation. Consequently, a subjective state of mind, except when directly provable by admissions against interest, is a wholly inappropriate standard to the objective tort of recklessness.[187]

The reasons that determine when one believes facts to be true and free from serious doubt are many and complex. They depend not only upon the information available, but upon impressions obtained when that information was received and upon prior life experience as it is used to evaluate information. By requiring a jury to determine the credibility of a defendant's claim that he did not have serious doubt as to the truth, we countenance a result which may be contrary to fact. Despite a completely adverse state of knowledge, the defamer, on objectively unreasonable grounds, may have honestly believed[188] he had no serious doubts as to truth. It is not surprising that a jury would reach a verdict that is at variance with such honestly-held beliefs based upon what it will accept as believable and as manifesting heedless indifference to the consequences of publication.[189] When this occurs, the verdicts are not based upon credibility; instead, they are based upon a value judgment as to what a reasonably prudent man should, or should not, have published, based on the information available.

Faced with an impending jury charge that before reckless disregard may be found, the jury must find, by clear and convincing evidence, that the defendant *in fact* had serious doubts as to the truth, counsel for the plaintiff must make a logically impossible closing argument. He must argue that the investigatory facts, when objectively analyzed, yield the inference that the reporter knew he was publishing a falsehood and that his denials at trial are mere falsehoods to avoid culpability. Logically, however, the inferences from the objective evidence the plaintiff has offered prove nothing as to the defendant's pre-publication mental state. They prove only what should have been known to a prudent reporter. Consequently, the defense's closing argument will make the point that the failure to check further or await supporting documents, while in retrospect perhaps not diligent, does not in any way prove that his client did not believe his sources and his story. The defendant may further argue that demonstrating that a story does not sound believable to a fair-minded person or that a source should not be believed by the jury in retrospect, does not demonstrate that the defendant was reckless in believing it. Counsel for defendant would finish by pointing out that his client is not to be judged by what he should have believed but by what he did believe, regardless of whether a juror would have believed the story true. Thus, a struggle over what was the reporter's state of mind is not consistent with the tortious concept of recklessness. This is true because the concept of recklessness is not reconcilable with a subjective determination. To ignore this problem and confine the inquiry to "in fact" proof of knowledge, is to involve the parties in an evidential quandry. Juries should not be forced to continue to struggle with these logical contradictions.[190]

187. *See* RESTATEMENT (SECOND) OF TORTS § 500 (1965).

188. *New York Times*, 376 U.S. at 286-87.

189. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

190. *Id.* at 108. *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 79 (1964); St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

B. *What Must Be Done to Correct the Problem—Conclusion*

The subjective test has misdirected the evolution of the case-by-case defining process through insistence upon defining the defendant's state of mind. Despite this restrictive standard, plaintiffs occasionally prevail, if only in the most flagrant[191] instances of libelous endeavor. Those flagrant cases reveal a judicial effort to obviate the need for adherence to the state of mind test by substituting accepted objective tests for recklessness.[192] The common thread of these decisions is to allow culpability for those who publish with reason to know the unreasonable risk of falsity that is being incurred.

In the forefront of these cases is *Walker v. Colorado Springs Sun, Inc.*[193] The requirement of "in fact" recognition of serious doubt was rejected by the Colorado Supreme Court:[194] "whether or not a statement is true does not mean that there must be a finding that the person making the statement had serious doubts as to the truth thereof." In place of the subjective probability requirement, *Walker* adopted a state of knowledge and conduct inquiry. Reckless disregard could be found if the evidence demonstrated "indifference to the consequences,"[195] when a justified basis for believing the article true did not exist.[196] The test is patently objective and the premium on ignorance is removed.

Approval of such a change in the law should not have to be inferred from denials of certiorari. The requirement of proving reckless disregard through efforts aimed at showing an elusive mental state should be abolished.[197] An objective test based upon state of knowledge should be substi-

191. *Id.*

192. *See* Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363 (N.D. Cal. 1977).

193. 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

194. 188 Colo. at 98, 538 P.2d at 457.

195. *Id.*

196. The Colorado Supreme Court based its adoption of this objective standard upon the United States Supreme Court's approval of the "indifference to consequences" jury charge in Cantrell v. Forest City Publishing, 419 U.S. 245 (1974). 188 Colo. at 99, 538 P.2d at 457. While *Walker* was a post-*Gertz* private-individual action, the fault standard applied was recklessness as defined by Colorado tort law. *Id. See also* Dixson v. Newsweek, 562 F.2d 626, 629 (10th Cir. 1977), and its conclusion that *Cantrell* was cited in *Walker*, "to support the conclusion that a less demanding standard than that required by *St. Amant* was constitutionally permissible." *Dixson* defines reckless disregard under Colorado law as being, "an act destitute of heed or concern for consequences, especially foolishly heedless of danger; headlong, rash, without thought or care of consequences." *Id.* at 629. *See also* Anderson and Pagliuca, *The Colorado Supreme Court's Developing Defamation Guidelines: Colorado Enters the Quagmire*, 59 DEN. L.J. 627, 630-32 (1982).

Walker was later cited as controlling in a public figure objective determination decision, Kuhn v. Tribune Republican Publishing Co., 637 P.2d 315 (Colo. 1981). The Colorado Supreme Court has since limited *Walker*'s recklessness objective test to cases involving private individual plaintiffs where, "matters of public or general concern" are *not* involved. *See* Diversified Management, Inc. v. Denver Post, Inc., 653 P.2d 1103, 1109-10 (1982). The *Walker* decision had accepted the *Gertz* invitation to the states to define a fault standard by adopting the Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), plurality opinion as to applying the actual malice standard to matters of public interest, although that choice, as a constitutional criteria, was rejected by the Court in *Gertz*, 418 U.S. at 347. This line of Colorado cases well illustrates the "quagmire" of attempting to decide upon motivation by circumstantial evidence of a mental state at a particular point in time.

197. An objective determination of an unreasonable or imprudent risk assumption, reaching the level of reckless disregard, would encompass those situations where one was not *aware* of falsity by more than fifty percent.

tuted as the benchmark. Juries, and not courts, would then again be permitted to decide material issues of fact in the area of defamation.

The roadbed for such change has already been marked. The obscenity cases[198] demonstrated similar "intractible problems"[199] arising out of attempts at defining standards of culpability on an *ad hoc* basis. Ultimately, it was determined that what is or is not obscene is to be decided by a jury based on an average person criterion, where the "rule of reason" is applied.[200] Such a rule already applies to juries deciding compensatory defamation claims by private individuals.[201] There is no valid reason why the reasonably prudent man should not be recognized as the determinant of the conduct of those who falsely defame others through reckless disregard of whether a defamatory falsehood is true or not.

198. Roth v. United States, 354 U.S. 476 (1957) and Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968).

199. Miller v. California, 413 U.S. 15, 24 (1973).

200. *Id.*

201. Gertz v. Robert Welch, Inc., 418 U.S. 323, 329 (1974).

WATER RIGHTS FOR EXPANDED USES ON FEDERAL RESERVATIONS

KIRK S. SAMELSON*

I. INTRODUCTION

In November of 1982 the Colorado Supreme Court decided *United States v. City and County of Denver*,[1] a leading case in the area of federal reserved water rights. The major issue addressed was the claim of the United States for reserved water rights for national forests and national parks. The Colorado Supreme Court, based on dictum from the United States Supreme Court case of *United States v. New Mexico*,[2] declared that when Congress enlarged the purposes for which national forests are administered through passage of the Multiple-Use Sustained-Yield Act of 1960[3] (MUSYA), it did not implicitly increase the amount of water reserved for national forests.[4] Despite this holding, the Colorado court allowed the United States to acquire additional reserved water rights when lands originally reserved for national forest purposes became part of Rocky Mountain National Park.[5]

The court ruled Rocky Mountain National Park acquired reserved water rights as of the date of creation of the national forest, but these reserved rights were limited to purposes that were common to both forest and park reservations, such as watershed and timber protection. Additional reserved rights were granted for the enlarged purposes of the national park as of the dates the land was reclassified.[6] The court never explained how it could deny increased rights for the enlarged purposes of the MUSYA, but grant them when a reservation is reclassified. This ruling raises a question concerning the treatment of reserved right claims for other reclassified federal reservations, and for reservations affected by a statutorily enlarged purpose. As will be discussed, the courts have two alternatives: deny additional reserved rights as was done when the purposes of the national forests were enlarged by the MUSYA[7] or grant new rights for the enlarged purposes resulting from reclassification as was done in Rocky Mountain National Park.[8] This paper will explore the alternatives from a legal and practical stand-

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1. 656 P.2d 1 (Colo. 1982).

2. 438 U.S. 696 (1978).

3. Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528-531 (1976)) (statute applies to Forest Service lands and directs that the lands be managed so as to ensure multiple use and sustained yield).

4. 656 P.2d at 24-27.

5. *Id.* at 30.

6. *Id.*

7. United States v. New Mexico, 438 U.S. 696 (1978); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

8. United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

point, and offer a framework for resolving the conflict.[9] Before proceeding, however, it is necessary to have an understanding of the doctrines of prior appropriation and federal reserved water rights.

II. BACKGROUND—FEDERAL RESERVED WATER RIGHTS AND PRIOR APPROPRIATION

In the arid western states, a system of laws developed for the regulation of water usage that was completely alien to the Eastern and English systems of riparian rights.[10] Called the doctrine of prior appropriation, this system provides that available water can be appropriated for a beneficial use by any person.[11] Unlike the riparian system, an appropriator need not own land bordering a stream, and the water right acquired is totally separate from the land. The right to water from a particular stream is determined by priority of appropriation. The holders of the senior, or oldest, water rights are entitled to satisfy their water needs before the holders of junior rights.[12]

A conflict that arose out of application of the prior appropriation doctrine concerned water rights for federal lands. One question concerned whether the United States was bound by state prior appropriation laws affecting federal lands, and if not, how was the United States to acquire water for its federal reservations. A second question raised by the prior appropriation doctrine concerned determination of the priority date for federal water rights. The first case addressing these issues, *Winters v. United States*,[13] involved a conflict over the use of water on Fort Belknap Indian Reservation in Montana. Congress in 1888 reserved the Fort Belknap area as an Indian reservation and simultaneously opened adjacent lands for homesteading.[14] In 1898, after creation of the reservation, the Indians developed an agricultural project requiring 5,000 inches of water per year from the adjacent Milk River.[15] Prior to 1898, but after 1888, the defendants homesteaded on land upstream from the reservation and appropriated 5,000 inches of water from the Milk River under the laws of Montana.[16] The United States, suing on behalf of the Indians, sought to enjoin the defendants from diverting water

9. *See infra* notes 46-57 and accompanying text. A third alternative of backdating priorities is also briefly discussed.

10. Riparian rights can generally be described as the right of a riparian landowner to a reasonable quantity of water from the adjacent stream to supply his needs. In general, this right is appurtenant and cannot be conveyed apart from the land. *See generally* S. CIRCIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, & A. STONE, 1 WATERS AND WATER RIGHTS § 16 (1967).

11. *See generally* R. BECK & E. CLYDE, 5 WATERS AND WATER RIGHTS §§ 405-14 (1972) (a discussion of the prior appropriation doctrine).

12. Nine states apply a pure appropriation system. They are Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. Other western states recognize both riparian and appropriation rights, although appropriative rights apply predominately. States that follow this mixed system are California, Nebraska, Kansas, North Dakota, South Dakota, Oklahoma, Oregon, Texas, and Washington. F. TRELEASE, WATER LAW RESOURCE USE AND ENVIRONMENTAL PROTECTION 11 (2d ed. 1974).

13. 207 U.S. 564 (1908).

14. Act of May 1, 1888, ch. 213, 25 Stat. 113.

15. 207 U.S. at 566.

16. *Id.* at 568-69.

from the river because it left the reservation with insufficient water for irrigation.

The United States Supreme Court affirmed the lower court's ruling in favor of the United States and announced the proposition that the Indians acquired the rights to adequate quantities of water for the reservation as of the date when the lands were reserved. Although the 1888 reservation agreement never specifically mentioned water, the Court found that Congress implicitly reserved the water for reservation purposes.[17] Consequently, the Indians' right to the water was held to be senior to any appropriation made pursuant to state law after the reservation was created.[18]

The *Pelton Dam*[19] case clarified the issue of federal reserved water rights for land reserved[20] from the public domain. The Supreme Court held that the United States is not required to follow state laws regarding water appropriation for reserved lands.[21] This holding refuted state claims that Congress had provided for total state control over the use of water.

Arizona v. California,[22] the first case extending the application of the reserved rights doctrine to federal reservations other than Indian reservations, involved reserved right claims for national recreation areas and national forests.[23] The Court extended the reasoning set forth in *Winters* and held that federal reserved rights apply to non-Indian reservations. Because it would have been meaningless for the United States to reserve land from the public domain unless it also reserved sufficient water to accomplish the purposes for which the land was reserved, the Court reasoned that the Government intended to reserve water sufficient for future requirements. Consequently, reserved rights were granted to the Government with priority dates as of the creation of the reservations.[24]

Congress, in 1952, passed the McCarren Amendment,[25] which granted jurisdiction to state courts to adjudicate and administer water rights claimed by the United States. Although arguably under the McCarren Amendment, the United States relinquished its authority to claim reserved water rights, the Supreme Court held the McCarren Amendment was a waiver of sovereign immunity only for purposes of state administration of federal reserved rights.[26] Once the United States claims reserved rights, state courts can administer and quantify those rights. The state courts have no authority, however, over the *creation* of federal reserved rights.

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17. *Id.* at 575-77.
18. *Id.* at 577.
19. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).
20. Withdrawn land is land owned by the federal government that is withheld from private appropriation and disposal under the public land laws. A withdrawal is usually accomplished by an executive order of the Secretary of the Interior, or an act of Congress. A reservation is a withdrawal for a specific purpose such as an Indian reservation, national forest, or national park. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 42 n.1 (1970).
21. 349 U.S. at 444-45.
22. 373 U.S. 546 (1963).
23. *Id.* at 601.
24. *Id.* at 595-601.
25. 43 U.S.C. § 666 (1976).
26. United States v. District Court, 401 U.S. 520 (1971).

III. *UNITED STATES V. NEW MEXICO*

United States v. New Mexico[27] halted the Court's trend of enlarging the scope of the federal reserved water rights doctrine. In *New Mexico*, the United States asserted reserved water rights in the Rio Mimbres River for the Gila National Forest. The forest was originally reserved in 1899 under the Organic Administration Act of 1897.[28] The MUSYA, which amended the Organic Administration Act, legislatively expanded the uses for which national forests are administered.[29] In its claim for reserved rights, the United States argued that the MUSYA merely codified the purposes for which national forests were already being administered. As a result, reserved rights for Gila National Forest should be granted for the MUSYA purposes with a priority date of 1899.[30] The Court rejected this argument based on the legislative history of the MUSYA.

The 1897 Organic Administration Act only authorized the creation of national forests for two purposes—timber preservation and enhanced water supply. The MUSYA expanded the purposes of national forests administration beyond these two,[31] therefore there were no reserved water rights with an 1899 priority for the MUSYA purposes. Furthermore, the Court stated that the MUSYA purposes were secondary to the purposes for which the national forests were created. Although the Court acknowledged that Congress intended the national forests to be administered for broader purposes after 1960, they could find no indication that Congress intended to reserve additional water for secondary MUSYA purposes.[32] The Court refused to grant reserved water rights with a 1960 priority date for these secondary purposes. The 1960 priority date was rejected even though the United States made no claims for the 1960 date.[33]

IV. PROGENY OF THE *NEW MEXICO* CASE

Four cases since *New Mexico* have cited it for the proposition that there are no federal reserved water rights for secondary purposes of federal reservations.[34] In three of these cases, however, the citation was dictum to the decision.[35] In *Colville Confederated Tribes v. Walton*,[36] the Ninth Circuit

27. 438 U.S. 696 (1978).

28. 16 U.S.C. §§ 473-482 (1976). The Act states: "No national forest shall be established except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." *Id.* at § 475.

29. 16 U.S.C. § 528 (1976). The MUSYA declared "[t]hat the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes . . . of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests are established." *Id.*

30. 438 U.S. at 713 n.21.

31. *Id.*

32. *Id.* at 715.

33. *Id.* at 713.

34. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W. 5095 (1983); Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

35. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W.

determined the amount of reserved water available for the Colville Indian Reservation in Washington. The court quoted the *New Mexico* Court's denial of reserved rights for secondary purposes, but then proceeded to define broadly the primary purposes of the Colville Reservation. Because historically the Indian tribes relied heavily on fishing and farming for their subsistence, the Ninth Circuit found implicit in the reservation sufficient reserved water to satisfy these historical uses. Secondary purposes were not mentioned further.[37]

Sierra Club v. Watt[38] also cited the *New Mexico* prohibition against granting reserved water rights for secondary purposes on federal reservations. The issue was not, however, addressed fully. The land in question was in the public domain and not reserved or withdrawn land; therefore, there were no reserved water rights associated with those parcels.[39] Another reference to the secondary purpose prohibition occurred in *San Carlos Apache Tribe v. Arizona*.[40] The primary issue in *San Carlos* was whether state or federal courts had jurisdiction over Indian reserved water rights. Aside from stating the secondary purpose limitation, the doctrine was not mentioned.

V. *UNITED STATES V. CITY AND COUNTY OF DENVER*

The Colorado Supreme Court, in *United States v. City and County of Denver*,[41] addressed the issue of federal reserved water rights for many federal reservations within the state. One of the government's assertions in the case was a claim of federal reserved water rights for the purposes of recreation and wildlife conservation in seven national forests with a priority date of 1960 based on the MUSYA.[42] In rejecting the government's claim, the court abided by the Supreme Court's statement in *New Mexico* that the MUSYA was not a reservation of any additional water rights for national forests.[43] Although the statement may have been dictum,[44] the Colorado court indicated it was bound by the ruling.[45]

The *Denver* ruling indicates that when the purposes of a federal reservation are changed to allow for broader administration, for example, outdoor recreation, range, timber, watershed, wildlife and fish purposes, additional federal reserved water rights will not be granted to accommodate the expanded purposes. The difficulty with the *Denver* holding is that the opinion contradicts itself; after ruling that no additional water rights will be granted for national forests as a result of MUSYA, the court granted additional reserved water rights for Rocky Mountain National Park based on the park's

5095 (1983); Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

36. 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).
37. *Id.* at 47-48.
38. 659 F.2d 203 (D.C. Cir. 1981).
39. *Id.* at 206.
40. 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W. 5095 (1983).
41. 656 P.2d 1 (Colo. 1982).
42. *Id.* at 24.
43. 438 U.S. 696, 715 (1978).
44. *Id.* at 718 n.1.
45. 656 P.2d at 24.

change in designation from a national forest to a national park.[46] The court reasoned that the simple reclassification of national forest lands to national park status did not rescind the national forest timber and watershed protection purposes for which the lands were originally reserved; therefore, the government was granted reserved water rights with a priority date of 1897 for national forest purposes. For national park purposes, however, the reserved rights were granted with a priority date as of the park's creation.[47] Thus, the court allowed expanded water rights when the classification of a reservation was changed from national forest to national park, but not when the purposes for administration of national forests was enlarged statutorily as under the MUSYA.

The question then is: where do other federal reservations, whose classification has been changed or purposes enlarged, stand with regard to reserved water rights? The courts have three alternatives: grant no additional reserved water rights using the *New Mexico* rationale, grant additional reserved rights for the enlarged purposes as of the date the purposes are expanded using the *Denver* logic, or grant additional water rights with a priority backdated to the creation of the original reservation as with the Lake Mead National Recreation Area.[48]

There are areas such as Zion National Park,[49] Capital Reef National Park,[50] and Arches National Park[51] that were changed in designation from national monuments to national parks where the issue of reserved rights is not settled. National monuments were created in accordance with the American Antiquities Preservation Act of 1906,[52] for the purpose of preserving areas of historic and scientific interest.[53] The National Park Service Act of 1916[54] brought national monuments into the national park system.[55] The purposes of national parks, which include recreation and conservation of scenery, natural objects and wildlife, are much broader than the purposes of monuments.[56] Arguably, the National Park Service Act modifies the Antiq-

46. *Id.* at 30.

47. *Id.*

48. Arizona v. California, 373 U.S. 546 (1963). The Court awarded reserved rights to the Lake Mead Recreation Area based on 1929 and 1930 general withdrawals, even though the express purposes of the area were not stated until 1964. Op. Solic. Dep't of Interior, 86 Interior Dec. 553, 600 (1979).

49. Act of Nov. 19, 1919, ch. 110, § 1, 41 Stat. 356 (codified at 16 U.S.C. § 344 (1976)).

50. Act of Dec. 18, 1971, Pub. L. No. 92-207, 85 Stat. 739 (codified at 16 U.S.C. § 273 (1976)).

51. Act of Nov. 12, 1971, Pub. L. No. 92-155, 85 Stat. 422 (codified at 16 U.S.C. § 272 (1976)).

52. Pub. L. No. 209, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-458 (1976 & Supp. V 1981)).

53. The Antiquities Act states in part: "The President . . . is authorized . . . to declare . . . historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest . . . to be national monuments. . . ." *Id.* at § 431.

54. Pub. L. No. 64-235, 39 Stat. 535 (codified as amended in scattered sections of 16 U.S.C.)

55. *Id.* at § 2 (codified as amended at 16 U.S.C. § 1 (1976)).

56. The National Park Service Act directs that:

> the [s]ervice . . . shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for

uities Act to enlarge the purposes of national monuments to coincide with those of national parks. The United States made this assertion in *Denver* for Dinosaur National Monument, but it was rejected by the Colorado Supreme Court. The court held that the National Park Service Act of 1916 did not eliminate the distinction between parks and monuments, but simply included monuments in the National Park System to provide for administration and management by the National Park Service rather than the Forest Service.[57]

Accepting this interpretation of the National Park Service Act there are still three possible outcomes for reserved water rights in an area such as Zion National Park. Zion National Park was originally reserved in 1909 as a national monument.[58] The area was redesignated as a national park in 1919.[59] Following the rationale of *New Mexico*, no increased water rights should be granted with a 1919 priority date, and only that water necessary for a national monument would be reserved with a priority date of 1909. Using the *Arizona v. California* logic, Zion National Park would have enough reserved water appropriate for a national park with a priority backdated to 1909. If the *Denver*, Rocky Mountain National Park reasoning is applied, reserved rights would be granted for monument purposes with a 1909 priority and additional reserved rights for national park purposes would be granted with a 1919 priority. No court, since *Arizona v. California*, has backdated the priority for reserved water rights for federal reservations; therefore, this concept seems to carry little weight. It is necessary to explore the rationale of *New Mexico* and *Denver* to determine which of the two remaining alternatives is most consistent with congressional intent.

VI. REASONING BEHIND *NEW MEXICO* AND *DENVER*

The United States Supreme Court,[60] and subsequently, the Colorado Supreme Court,[61] based their rulings that MUSYA did not create new federal reserved water rights on an interpretation of one sentence in MUSYA: "The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title."[62] Because of this wording, the Court concluded the purposes established by the MUSYA were secondary to the purposes for which the national forests were created, and therefore, no additional water was reserved for those purposes. The Court in *New Mexico* quoted a MUSYA House Report as support for its conclusion that the MUSYA purposes were supplemental to the national

> the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Id.

57. 656 P.2d at 28.

58. Zion National Monument was reserved by Presidential Proclamation *reprinted in* 36 Stat. 2498 under the authority of the American Antiquities Act, Pub. L. No. 209, 343 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-458 (1976 & Supp. V 1981)).

59. Act of Nov. 19, 1919, ch. 110, § 1, 41 Stat. 356 (codified at 16 U.S.C. § 344 (1976)).

60. United States v. New Mexico, 438 U.S. 696, 702, 713-15 (1978).

61. United States v. City and County of Denver, 656 P.2d at 26.

62. 16 U.S.C. § 528 (1976).

forest purposes of timber and watershed protection.[63] The Court failed, however, to include the next sentence of the House Report, "It is also clear that the Secretary of Agriculture shall administer the national forests for all of their renewable natural resources, and none of these resources is given a statutory priority over the others." This negates the interpretation that the MUSYA purposes are secondary to those enumerated in the Organic Act.[64] Whereas the Court implies the statute's wording that "the purposes . . . are supplemental to, but not in derogation of, the purposes for which the national forests were established. . . ."[65] gives the purposes of MUSYA secondary characteristics, an investigation into the definitions of "supplemental" and "derogation" gives a different result. Supplemental means an addition "to supply a deficiency or defect."[66] Derogation is defined as a "nullification, avoidance, or abrogation, in whole or in part, as a statute nullifying common law rights."[67] The plain meaning of the statute places the MUSYA purpose on equal footing with the purposes of the 1897 Act because the MUSYA was added to correct a defect, but not to nullify the purposes for which national forests were established.

The House Report further supports the conclusion that MUSYA purposes are not secondary in its statement of priority of resource use. Congress did not give the purposes of the 1897 Act priority over the MUSYA purposes.[68]

Another interpretation of the MUSYA given by both the United States and Colorado Supreme Courts is that the MUSYA expanded the purposes for which the national forests are administered but did not expand the reserved water rights of the national forests for the enlarged purposes.[69] The

63. United States v. New Mexico, 438 U.S. at 714. The House Report contains the following language:

> The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flow and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897. Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest would not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. REP. NO. 1551, 86th Cong., 2d Sess. 4, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 2380 [hereinafter cited as H.R. REP. NO. 1551].

64. *Id.*

65. 16 U.S.C. § 528 (1976).

66. BALLENTINE'S LAW DICTIONARY 1241 (3d ed. 1969).

67. *Id.* at 340.

68. The House Report indicates that:

> In practice, the priority of resource use will vary locality by locality and case by case. In one locality timber use might dominate; in another locality use of the range by domestic livestock in another outdoor recreation or wildlife might dominate. . . . One of the basic concepts of multiple use is that all of the named resources in general are of equal priority. . . .

H.R. REP. NO. 1551 at 2379, 2382.

69. United States v. New Mexico, 438 U.S. 696, 713 (1978); United States v. City and County of Denver, 656 P.2d 1, 26 (Colo. 1982).

counter argument to this is a practical one. How can the national forests be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes if the water to sustain these uses is not made available? The courts have recognized the purposes, but have not given the Forest Service the tools to carry out these purposes.

The final rationale used by the courts to justify the denial of additional reserved water rights based on MUSYA is that increasing federal reserved rights reduces the amount of water available to satisfy long-held, adjudicated water rights, especially in fully-appropriated streams.[70] There are two answers to this contention: 1) long-held rights would not be affected if the additional reserved waters were given a priority date of 1960, and 2) in the past, the courts have not been reluctant to grant federal reserved water rights even when adjudicated water rights are affected adversely. If the national forests are granted reserved rights with a 1960 priority date for the purposes enunciated in MUSYA, it is doubtful that any owners of adjudicated water rights would be affected. All of the purposes stated in MUSYA contemplate in-stream use meaning that the water would be available for appropriation once it left the national forest. The only persons possibly affected would be owners of water rights with a priority date after 1960 who diverted their water from within the national forest. Thus, the most logical alternative, when a federal reservation changes designation to allow for increased purposes is to follow the Colorado Supreme Court's decision for Rocky Mountain National Park and allow additional reserved water rights with a priority date as of the change of designation.

VII. CONCLUSION

The dissent in *United States v. New Mexico* asserted that the ruling denying additional reserved water rights for national forests with a 1960 priority date was dictum.[71] The Colorado Supreme Court was of the opinion that that ruling was binding even if dictum. The issue concerning additional water for national forests based on MUSYA may never reach the Supreme Court again, however, there are other federal reservations such as Zion, Arches, and Capital Reef National Parks with analogous backgrounds concerning water rights that have yet to be heard in court. There are many legal and practical reasons to grant those areas additional water as of the date their designation of use changed. As the New Mexico Supreme Court said in *Mimbres Valley Irrigation Co. v. Salopek*,[72] the case that became *United States v. New Mexico*,

> We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide

70. United States v. New Mexico, 438 U.S. at 705, 715; United States v. City and County of Denver, 656 P.2d at 26.

71. United States v. New Mexico, 438 U.S. at 718 n.1.

72. 90 N.M. 410, 564 P.2d 615, *aff'd sub. nom* United States v. New Mexico, 438 U.S. 696 (1977).

differently.[73]

Hopefully, the courts in the future will realize that the leeway to grant additional water for federal reservations with expanded purposes exists. The expansion of the purposes of federal reservations has a primary or secondary impact of protecting the environment. By granting additional water for these environmental purposes, the courts will help preserve our natural resources for future generations.

73. *Id.* at 414, 564 P.2d at 619.

ANTITRUST STANDING: LABOR IS GIVEN A NEW TEST IN *ASSOCIATED GENERAL CONTRACTORS*

INTRODUCTION

The sparse legislative guidance[1] for interpreting section 4 of the Clayton Act[2] has placed the burden of developing a framework for antitrust standing analysis on the courts. The federal courts, searching for a consistent approach to determine whether a party allegedly injured by an antitrust violation has standing to sue,[3] have historically applied four tests: direct injury,[4] target area,[5] zone of interests,[6] and matrix of factors.[7] Previously reluctant to assess the utility of these tests, the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*[8] has finally reconciled the various approaches by formulating its own version of a balancing test.

In *Associated General Contractors*, the Court articulated six factors which controlled their balancing test. Three of the factors, intent of the violator, risk of duplicative recovery, and directness of the injury, will provide a cogent framework for future antitrust standing determinations. The other three factors, type of injury, difficulty of damage apportionment, and speculativeness of the claim, however, do not appear to be satisfactory considerations for a standing analysis.

Concluding that the alleged injury was not of a type protected by the antitrust laws, the Court in *Associated General Contractors* denied a labor union standing to sue for treble damages under section 4.[9] The consequences of the *Associated General Contractors* decision are significant for labor organizations in that their ability to bring antitrust actions against alleged antitrust law violators has been substantially diminished.

This comment provides an overview of the legal background of private antitrust standing[10] and an analysis of the *Associated General Contractors* case.

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1. The legislative history of § 4 is sparse and sheds little light on the question of standing. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 811-12 (1977).

2. 15 U.S.C. § 15 (1976 & Supp. V 1981). The original version of § 4 was enacted as § 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890).

3. The term "standing" in private antitrust actions differs from the meaning of "standing" in constitutional litigation. In antitrust law, standing is used to determine whether the plaintiff is the proper party to maintain the action. A plaintiff must allege an injury in law as well as an injury in fact. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 907 n.31. *See* Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 6-7 (1966). In constitutional law, standing requires that the plaintiff allege an injury in fact. *See* Warth v. Seldin, 422 U.S. 490, 498-500 (1975).

4. *See infra* text accompanying notes 21-30.

5. *See infra* text accompanying notes 31-35.

6. *See infra* text accompanying notes 36-41.

7. *See infra* text accompanying notes 42-45.

8. 103 S. Ct. 897 (1983).

9. *See infra* text accompanying note 11.

10. The term "antitrust standing" as used in this comment refers only to *private* actions under § 4. Actions brought by the government are beyond the scope of this paper.

Particular reference is made to the positive and negative effects which this newly articulated balancing test can have on a plaintiff's ability to achieve standing in antitrust actions.

I. BACKGROUND OF ANTITRUST STANDING

The Clayton Act's private damages provision, section 4, is a broadly worded remedial statute which provides, in part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court in the United States . . . and shall recover threefold the damages by him sustained . . . .[11]

The Supreme Court has recognized that Congress imposed this multiple measure of damages in order to: 1) provide injured parties with an incentive to bring antitrust actions, 2) deter potential violators, 3) deprive violators of the fruits of their illegality, and 4) adequately compensate victims.[12]

In addition to section 4's remedial purpose, courts have also used this provision to determine whether a plaintiff has a right to maintain an antitrust action. In an effort to consistently evaluate a plaintiff's standing to sue for treble damages, the district and circuit courts have previously used four tests: direct injury, target area, zone of interests, and matrix of factors. The courts, however, have had great difficulty in applying any of these tests consistently to antitrust standing cases. In addition, until *Associated General Contractors*, the Supreme Court had not taken the opportunity to assess the merits of the various approaches set forth above.[13]

Despite its reticence in evaluating the various standing doctrines, the Supreme Court has denied standing under section 4 to a particular group of plaintiffs on two previous occasions.[14] In *Hawaii v. Standard Oil Co.*[15] the Court held that a state may not recover damages on behalf of its citizens for antitrust injuries sustained by its "general economy."[16] The Court reasoned that duplicative recovery could result if individual consumers and businesses, as well as a state on behalf of its general economy, were able to maintain actions under section 4.[17] In the second case, *Illinois Brick Co. v. Illinois*,[18] the majority held that only "direct purchasers" in the chain of manufacturing and distribution were injured parties who may maintain a

11. 15 U.S.C. § 15 (1976 & Supp. V 1981).

12. Blue Shield v. McCready, 457 U.S. 465, 472 (1982).

13. *Id.* at 476 n.12 (the Court noted that it had no occasion to "evaluate the relative utility of any of [the] possibly conflicting approaches toward the problem of remote antitrust injury.") For an overview of the different standing doctrines see generally P. AREEDA & D. TURNER, 2 ANTITRUST LAW §§ 333-42 (1978); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 247 (1977).

14. Two scholars have characterized the Supreme Court's approach in these two cases as a categorization approach, which involves drawing analogies to various categories of plaintiffs who in previous cases have been granted or denied standing. *See* Berger & Bernstein, *supra* note 1, at 820-30.

15. 405 U.S. 251 (1972).

16. *Id.* at 265.

17. *Id.* at 264.

18. 431 U.S. 720 (1977).

private antitrust action.[19] The Supreme Court's decisions in both *Hawaii* and *Illinois Brick* reflected strong judicial concern for minimizing the defendant's exposure to potential multiple liability arising from a single antitrust violation.[20]

A. *The Four Doctrines*

1. Direct Injury

In 1910, the Third Circuit's decision in *Loeb v. Eastman Kodak Co.*[21] dismissed an antitrust suit by a shareholder of an injured corporation because the plaintiff did not sustain any *direct injury*[22] from the company's antitrust violation.[23] The court concluded that any injury Loeb might have received as a shareholder was "indirect, remote, and consequential."[24]

The court's decision reflected judicial concern for the risk of duplicative recovery. If shareholders, in addition to the company itself, were allowed to recover treble damages from the antitrust violator, then duplicative damages would be assessed against the defendant for the same unlawful act. The court of appeals concluded that the statute's framers clearly did not envision the violator being assessed sextupled damages for a single anti-competitive act.[25]

The direct injury test, which was the pervasive test used until the target area approach was devised,[26] opened the door to a flurry of court-seeking methods to determine what constituted a direct or proximate injury stemming from an anti-competitive activity. Tapping the resources of contract and tort law, notions of privity[27] and intent[28] arose as a means of evaluation. The requirement of privity of contract between the violator and victim was dismissed, however, because it automatically excluded competitors from maintaining private action suits.[29] Similarly, some courts have held that a defendant's alleged intent to injure a plaintiff is insufficient to support anti-

19. *Id.* at 729.

20. In *McCready* the Supreme Court added another theme to its opinions in *Hawaii* and *Illinois Brick*: "the difficulty and consequences of apportioning damages may, in limited circumstances, be considered in determining who is entitled to prosecute an action brought under section 4." *McCready*, 457 U.S. at 475 n.11.

21. 183 F. 704 (3d Cir. 1910).

22. Although a federal judge had decided a similar case one year earlier in Ames v. American Tel. & Tel. Co., 166 F. 820 (C.C.D. Mass. 1909), the term "direct injury" did not arise until the decision in *Loeb*.

23. 183 F. at 709.

24. *Id.*

25. *See id.*

26. *See infra* text accompanying notes 31-35.

27. *See, e.g.*, Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); Klein v. Lionel Corp., 237 F.2d 13, 15 (3d Cir. 1956).

28. *See, e.g.*, Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955); International Rys. of Cent. America v. United Brands Co., 358 F. Supp. 1363, 1372 (S.D.N.Y. 1973), *aff'd on other grounds*, 532 F.2d 231 (2d Cir. 1976).

29. *E.g.*, South Carolina Council of Milk Producers v. Newton, 360 F.2d 414, 417 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); FLM Collision Parts v. Ford Motor Co., 406 F. Supp. 224, 238 (S.D.N.Y. 1975), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

trust standing.[30]

2. Target Area

In 1951, the Ninth Circuit developed the target area test.[31] The target area test requires that a plaintiff demonstrate that his antitrust injury is within the economic area endangered by a breakdown of competitive conditions.[32] If the injury is found to be within the endangered area, then the plaintiff has standing to maintain an antitrust action under section 4.[33]

Due to the broadness of the "endangered area" concept, the courts have sought to define its parameters by applying the doctrine of foreseeability. The foreseeability doctrine requires that the alleged injury is within the economic area foreseeably harmed by an antitrust violation.[34] The foreseeability approach, however, has been rejected by several courts because it allows a party to sue without regard to their relationship to the defendant.[35]

3. Zone of Interests Test

In 1975, the Sixth Circuit case of *Malamud v. Sinclair Oil Corp.*[36] introduced the zone of interests analysis into the field of antitrust standing. In *Malamud*, the court allowed a gasoline retailer to sue for treble damages for alleged lost profits due to a gasoline supplier's failure to provide financial assistance for the retailer's expansion plans.[37] The court reasoned that the availability of financing and the denial thereof by Sinclair arguably came within a zone of interest—combination or conspiracies in restraint of trade

30. *E.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339, 1342 (D. Md. 1974). For a discussion of the problems of an intent requirement, see generally, Sherman, *Antitrusting Standing: From* Loeb *to* Malamud, 51 N.Y.U. L. REV. 374, 389-91 (1976).

31. Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). The target area test has been adopted in other circuits as well. *See, e.g.*, Commerce Tankers Corp. v. National Maritime Union of America, 553 F.2d 793 (2d Cir. 1977); Donovan Construction Co. v. Florida Tel. Corp., 564 F.2d 1191 (5th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978).

32. 193 F.2d at 54-55.

33. Compared to the direct injury rule, the target area approach shifts the emphasis from the victim-violator relationship to the victim's relationship with the area of the economy allegedly injured by the defendant. *In re* Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127-28, *cert. denied*, 414 U.S. 1045 (1973).

34. The foreseeability approach in antitrust standing ensued from language in *Karseal*, 221 F.2d at 358, where the court concluded that the plaintiff "was not only hit, but was aimed at" by the defendant. *Id.* at 365. The court in Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964), stated that the language "was intended to express the view that . . . plaintiff's affected operation was actually in the area which it could reasonably be foreseen would be affected by the conspiracy." *Id.* at 220. *See also* Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967).

35. In Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), the court rejected the foreseeability notion by stating that, the "foreseeability test . . . would permit anyone to sue, regardless of how distant his interest or relationship . . . since it would be difficult to disprove the fact that remote economic repercussions in the line of distribution result from almost every antitrust violation." *Id.* at 1296 n.2.

36. 521 F.2d 1142 (6th Cir. 1975).

37. *Id.* at 1151-52.

protected by the antitrust laws.[38] The court, articulating the zone of interests test, stated that if a plaintiff's injury arguably comes within the zone of interests protected by the antitrust laws, he could maintain a treble damage action under section 4.[39]

The Sixth Circuit, in *Malamud*, criticized the direct injury and target area methods as prematurely deciding the merits of the antitrust claims "under the guise of assessing" a claimant's standing to sue.[40] Adopting the zone of interests approach from administrative law, the Sixth Circuit concluded that this test was preferable because it did not demand as much from the plaintiff at the pleading stage of the action.[41]

4. Matrix of Factors Analysis

The final method used to determine legal causation allowing a plaintiff standing under section 4 is the balancing test espoused in 1976 by the Third Circuit in *Cromar Co. v. Nuclear Materials and Equipment Corp.*[42] Reasoning that all antitrust standing analyses inherently include a weighing of factors, the Third Circuit adopted a case-by-case balancing approach to antitrust standing evaluations.[43] The court concluded that a matrix of important factors should be analyzed to determine whether the plaintiff "is one whose protection is the fundamental purpose of the antitrust laws."[44] The court listed the following as the controlling factors: the nature of the industry from which the alleged antitrust violation flows, the relationship between the plaintiff and the alleged violator, and the effect of the violation upon the injured party.[45]

II. *ASSOCIATED GENERAL CONTRACTORS*

A. *Facts*

Against this background of a judicial search for a proper standing criteria, the *Associated General Contractors* case was brought before the courts. The case involved a class action suit initiated by two labor unions, the California State Council of Carpenters,[46] and the Carpenters 46 Northern Counties

38. *Id.* at 1152.

39. *Id.* at 1152 (quoting Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

40. *Id.* at 1150.

41. 521 F.2d at 1149.

42. 543 F.2d 501 (3d Cir. 1976).

43. *Id.* at 505-08. Other courts as well have followed a case-by-case approach which focused on the factual matrix and the policy considerations for and against standing in the particular case. *See, e.g.,* Mid-West Paper Prod. Co. v. Continental Group, Inc., 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 99-100 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977).

44. 543 F.2d at 506.

45. *Id.*

46. The California State Council of Carpenters is the collective bargaining agent for carpenters and their affiliated local unions with respect to master collective bargaining agreements governing the California carpentry industry. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 529 (9th Cir. 1980).

Conference Board.[47] These two organizations (the Union) represented more than 50,000 individuals employed in carpentry-related industries throughout California.[48]

The defendant was Associated General Contractors of California, Inc. (Associated), a membership corporation comprised of more than 250 construction contractors.[49] For more than twenty-five years, the Union and Associated had entered into collective bargaining agreements governing the terms and conditions of employment in the California construction industry.[50]

The complaint alleged a continuing conspiracy by Associated and its members to weaken and destroy the collective bargaining agreements between the Union and those who employ the Union.[51] Among the acts allegedly committed in furtherance of the conspiracy were Associated's coercion of landowners to hire non-Union subcontractors.[52] The Union pleaded, inter alia, that this alleged conspiracy violated section 1 of the Sherman Act[53] by adversely affecting the trade of certain unionized firms.[54] The Union claimed to have suffered twenty-five million dollars in damages, and sought a trebling of those damages under section 4 of the Clayton Act.

The district court dismissed the complaint in its entirety for failing to state a claim for relief.[55] For the dismissal of the federal antitrust claim, the court reasoned that while collective bargaining agreements may give rise to antitrust violations, normal labor disputes between a union and an employer do not state a cause of action under section 4.[56]

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47. The Carpenters 46 County Conference Board is the collective bargaining agent for carpenters employed in the drywall industry. *Id.*

48. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 103 S. Ct. 897, 900 (1983).

49. *Id.*

50. *Id.*

51. Paragraph 23 of the complaint alleged:

> Since on or about April 1, 1974, and continuing to date, defendants and each of them have entered into a plan, scheme, agreement and conspiracy, knowingly, willfully and maliciously, whose purpose and ends are to abrogate, destroy, undermine and weaken the collective bargaining relationship between plaintiffs and each of them and defendants and each of them, and between plaintiffs and other parties to the above described collective bargaining agreements; included within the other parties are the California Drywall Contractors Association and all "memorandum contractors" to the above described master collective bargaining agreements.

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52. Paragraph 24(4) alleged that the defendants knowingly:

> advocated, encouraged, induced, *coerced*, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them.

Id. at 18. (emphasis added).

53. 15 U.S.C. § 1 (1976 & Supp. V 1981).

54. The Union further claimed that, through this conspiracy, Associated breached its collective bargaining agreements with the Union, violated California's antitrust statute, and committed the torts of intentional interference with contractual relations and intentional interference with business relationships. *Associated General Contractors*, 103 S. Ct. at 900 n.1.

55. Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 404 F. Supp. 1067 (N.D. Cal. 1975).

56. *Id.* at 1069. The court observed that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the National Labor Relations Board.

The Ninth Circuit reversed the dismissal of the Union's federal antitrust claim.[57] The court, with one member dissenting, used the target area theory and concluded that the Union was within the area of the economy endangered by a breakdown of competitive conditions.[58] The Ninth Circuit court reasoned that the Union's injury was not only a foreseeable consequence of Associated's alleged boycott, but also an intended result.[59] Rejecting the lower court's holding that a labor dispute exemption[60] be applied to this antitrust action,[61] the court of appeals concluded that the Union had standing to sue for treble damages under section 4 of the Clayton Act.[62] Disagreeing with the Ninth Circuit's decision, Associated perfected an appeal to the United States Supreme Court.

B. *The Majority Holding*

The United States Supreme Court reversed the judgment of the Ninth Circuit in an eight to one decision.[63] The broad issue the Court addressed was whether the antitrust claim sufficiently alleged that the Union was injured by reason of a violation of the antitrust laws.[64] The Court held that the Union's complaint was insufficient as a matter of law and denied the Union standing to sue for treble damages under section 4 of the Clayton Act.[65]

The Court began its antitrust standing analysis by reasoning that section 4, although broadly worded, should be narrowly construed. Alternatively stated, every injury incurred "by reason of" an antitrust violation should not be actionable.[66] Justice Stevens, writing for the majority, proceeded by noting the vain attempts federal judges have made to provide a definitive rule which would determine whether a plaintiff is a proper party to bring an antitrust action.[67] Stating that courts should analyze antitrust standing issues through a case-by-case method, the majority settled on a balancing of specific factors.[68]

Although acknowledging the importance of Associated's alleged intent to cause harm to the Union, the majority concluded that the improper mo-

57. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527 (9th Cir. 1980). The court of appeals affirmed the dismissal of all other claims. *Id.* at 529.

58. *Id.* at 538.

59. *Id.*

60. *See infra* text accompanying notes 113-19.

61. *Id.* at 536.

62. The court stated that its holding was consistent with several recent decisions in which employee groups had been allowed to maintain private antitrust actions on the ground that they were within the target area of the defendant's antitrust activities. *Id.* at 539. *See, e.g.*, Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1176-77 (5th Cir. 1976); International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 397-98 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974); Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975).

63. *Associated General Contractors*, 103 S. Ct. at 897.

64. *Id.* at 899.

65. *Id.* at 913.

66. *Id.* at 904-08.

67. *Id.* at 907-08.

68. *Id.* The Court stated that "courts should analyze each situation in light of the factors set forth in the text." *Id.* at 908 n.33.

tive of the plaintiff does not necessarily serve as the decisive factor for evaluating a plaintiff's standing under section 4.[69] Instead, the decision focused on the nature of the Union's injury. The court sought to determine whether the plaintiff's antitrust injury fell within the purview of congressional concern.[70] Justice Stevens, citing *Blue Shield of Virginia v. McCready*,[71] coined this determination as the *Brunswick* test.[72]

The *Brunswick* test involves a two-step analysis. The first step is to determine whether the injured party is a consumer or a competitor in the market in which trade was allegedly restrained.[73] The test's second step asks whether the injury was of a "type" Congress meant to redress by the antitrust laws.[74] If the plaintiff fails to satisfy either of the *Brunswick* requirements, its private antitrust claim will most likely be dismissed due to the plaintiff's lack of standing to sue.[75]

In *Associated General Contractors*, the Court held: 1) that the Union was neither a consumer nor a competitor in the restrained market;[76] and 2) that due to both the history of labor unions as unique organizations governed by a separate body of labor law, and the long labor-related relationship between Union and Associated, the Union's injury was not of a type Congress meant to redress.[77] Accordingly, the plaintiff failed both parts of the *Brunswick* test.

The Court continued its standing analysis by addressing the directness of the Union's injury. Stating that the individual unionized subcontractors (the Union's members) would be the direct victims of the alleged coercion, and not the Union itself, the majority concluded that the Union's injury was only an indirect result of the alleged violation. An indirect victim, the Court stated, is not guaranteed a right to maintain an action under section 4.[78]

An additional factor the Court applied was whether the Union's alleged injury was tenuous and speculative. Citing *Hawaii v. Standard Oil*,[79] the majority stated that if the alleged harm is remote and obviously speculative, then it may be appropriate to place the claim beyond the reach of section

69. *Id.* at 908.

70. *Id.*

71. 457 U.S. 465, 483-84 (1982).

72. The *Brunswick* test arose from the 1977 Supreme Court decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). In *Brunswick*, operators of bowling centers brought an action against a manufacturer of bowling equipment alleging that the manufacturer's acquisition of bowling centers violated antitrust laws. The Court held that the plaintiffs' loss of income, which would have accrued had the failing centers acquired by the defendant gone bankrupt, was not the type of injury the Clayton Act was intended to protect. *Id.* at 487.

73. *Associated General Contractors*, 103 S. Ct. at 909.

74. *Id.* at 910.

75. Although the Court in *Associated General Contractors* set forth a balancing test, the nuances of the majority opinion indicate that because the nature of the plaintiff's injury was not one which the antitrust laws intended to protect, the plaintiff should be denied standing regardless of the additional factors to be weighed. *See id.* at 908-09.

76. *Id.* at 909.

77. *Id.* at 909-10. The Court stated that a Union "will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers. . . ." *Id.* at 910.

78. *Id.* at 910-11.

79. 405 U.S. at 262-63 n.14.

4.[80] Largely due to the Union's lack of alleging specific injury in its complaint, the majority concluded that the Union's claim was "highly speculative".[81]

Making a judicial economy argument, Justice Stevens also noted the Court's policy to deny standing to a plaintiff whose antitrust claim would likely overburden the courts when they have to ascertain damages.[82] Finding that the district court would be exposed to numerous problems of identifying and apportioning the damages between the Union and its members individually, the Court concluded that the Union's claim would overburden the judicial system.[83] Adding this factor to its analysis, the majority held that the factors against allowing the Union standing outweighed those factors in favor of a suit.[84]

C. *The Dissent*

Justice Marshall's lone dissent argued that Congress' use of the words "*any person* who [has been] injured . . . by reason of *anything* forbidden in the antitrust laws" in section 4 manifests a legislative intent to broadly enforce alleged antitrust violations.[85] Noting the broad language of section 4 coupled with the Supreme Court's prior expansive readings of the statute,[86] Justice Marshall reasoned that the Union's antitrust injury did fit comfortably within the framework for standing.[87]

Justice Marshall rejected the majority's use of the direct-indirect injury factor.[88] Analogizing antitrust claims to tort actions, Justice Marshall stated that an inquiry into proximate cause has traditionally been rejected when the defendant *intends* to inflict injury upon the plaintiff. He reasoned that because the Union was the *intended* victim of Associated's coercive efforts to induce construction contractors to refrain from using unionized carpenters, the remoteness of the Union's injury was irrelevant for standing purposes.[89]

Agreeing with the majority that the exact reduction in dues may be a difficult fact-finding procedure, Justice Marshall stated that the plaintiff need only provide a reasonable estimate of the harm.[90] He emphasized the

80. 103 S. Ct. at 911.

81. *Id.* The Court also noted that the indirect nature of the Union's claim influenced its determination that the claim was highly speculative. *Id.*

82. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38, 745 (1977) (massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble damage suits); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 493 (1968) (denying defendants a defense that the plaintiff passed on their injury, the Court noted that any attempt to ascertain damages with precision would involve massive evidence and complicated theories).

83. 103 S. Ct. at 911-12.

84. *Id.* at 913.

85. *Id.* at 913 (Marshall, J., dissenting) (emphasis in original).

86. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (provision is broad enough to allow standing to a consumer who pays a higher price as a result of an antitrust violation); Pfizer Inc. v. India, 434 U.S. 308 (1978) (statutory phrase "any person" is broad enough to include a foreign sovereign).

87. 103 S. Ct. at 913 (Marshall, J., dissenting).

88. *Id.* at 914.

89. *Id.* at 914-15.

90. *Id.* at 916.

Court's policy of placing the burden of any uncertainty of damages upon the wrongdoer, and not upon the victim.[91]

Justice Marshall also stressed that the risk of duplicative recovery, a critical element in prior Supreme Court cases denying a plaintiff standing, was not a factor in the Union's claim.[92] The loss of union dues, the dissent pointed out, was an injury distinct from any possible claim that other injured parties may bring.[93] Recognizing the absence of risk of duplicative recovery, Justice Marshall concluded that the Union's action should not be dismissed solely on the basis of the pleadings.[94]

III. ANALYSIS

A. *The Balancing Test—An Appropriate Standing Doctrine*

Presented with different approaches to guide antitrust standing determinations, the majority in *Associated General Contractors* wisely decided on a compromise by creating its own version of a balancing test. Recognizing the difficulties of formulating a precise test to apply to all standing evaluations, the Court correctly averted adopting either the target area, direct injury, zone of interests, or matrix of factors test for its analysis.[95] Commentators have also expressed the apparent impossibility of applying any of these various tests and obtaining consistent results.[96]

The Supreme Court's decision to weigh certain factors in private antitrust standing determinations will provide a long-lasting framework for future standing cases. This is due to the flexible nature of balancing tests in general.[97] The test proportions the weight of relevant policies as each situation warrants. This flexibility is especially desired in antitrust litigation because of its inherent complexity and the constantly changing economic environment surrounding the antitrust laws.[98]

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91. *Id.* (quoting Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265 (1946)).

92. 103 S. Ct. at 915-16.

93. Justice Marshall reasoned that the loss of individual unionized subcontractor's revenues as a result of the alleged boycott would also decrease the amount of dues paid to the Union because part of the annual payment of dues is based on a percentage of work. *Id.* at 915.

94. *Id.* at 916.

95. The balancing test espoused in *Associated General Contractors* is quite similar, however, to the matrix of factors approach used in *Cromar*. In *Associated General Contractors*, the Court relied on a list of six factors to guide their analysis: intent of the violator, nature of the antitrust injury, directness of the injury, speculativeness of the claim, difficulty of apportioning damages, and the risk of duplicative recovery. 103 S. Ct. at 913. In comparison, the Third Circuit in *Cromar* focused on a set of three factors: the nature of the industry from which the alleged antitrust violation flows, the relationship between the plaintiff and the alleged violator, and the effect of the violation upon the injured party. 543 F.2d at 506.

96. *See* Berger & Bernstein, *supra* note 1, at 835, 843; Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 27-31 (1971); Sherman, *supra* note 30, at 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case").

97. The balancing test, which is used frequently in modern first amendment jurisprudence, has been noted as "an extremely flexible case-by-case approach." Gunther, *In Search of Judicial Quality of a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1027 (1972); *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 580-84 (1978).

98. It is widely recognized that each anti-competitive activity causes ripples of injury through an entire economy. *E.g., Billy Baxter*, 431 F.2d at 187. Accordingly, any attempt to divide damages in proportion to the amount of antitrust injury sustained by each consumer is a

A countervailing argument can be made, however, to the point that the balancing test may not provide rigid guidance to both the lower courts and the plaintiffs themselves. Exactly how the courts will apply the six factors of the balancing test to future antitrust standing cases remains to be seen. At least now, the antitrust plaintiff knows which standing test and by what criteria their standing status will be evaluated.

B. *The Choice of Factors*

Two of the six factors the Supreme Court used in its balancing test are important factors for antitrust standing determinations, namely, the risk of duplicative recovery and the intent of the violator. The majority, however, used three other factors which appear to be less useful when evaluating antitrust standing cases: the difficulty of apportioning damages, the speculative nature of the claim, and the nature of the injury.

First, the Supreme Court's concern for the risk of multiple recovery is a policy well-founded in precedent. The policy was announced as early as 1910[99] and reinforced in 1982 by the Court in *Blue Shield of Virginia v. McCready*.[100] In addition to case law support, traditional notions of equity demand that a defendant should not be penalized numerous times for the same injury.

Second, an alleged violator's intention to cause injury to a particular class of persons is also a relevant factor to consider in determining a plaintiff's standing to sue. It is well-settled that a defendant's specific intent may be important to the question whether a violation of antitrust law has been alleged.[101] Moreover, because intent is a requirement for certain antitrust violations, it is an important factor to consider in standing analyses.[102]

The Supreme Court used three other factors in their balancing test which are troublesome. First, although it is important to recognize the need

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complex procedure. *See Illinois Brick*, 431 U.S. at 731-32. ("Permitting the use of pass-on theories under section 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery. . . .") Formulating a consistent method to apportion antitrust damages is difficult not only because of the inherent complexity of the subject matter, but also because of the continued growth and volatility in the economic environment.

Since their enactment in 1890, the antitrust laws have developed in economies which are constantly changing. One sector which has served as a catalyst for this change is technology. The amount of technological advancement which has been made within the last century is outstanding. Moreover, the beginning of the computer era and its resultant increase in efficiency and productivity guarantees a continuously changing economic environment. Therefore, adopting a test such as the balancing test, which can more easily adapt to the economic realities surrounding the antitrust laws, appears to be a prudent approach.

99. The sixth factor, directness of the injury, can have both positive and negative effects on future antitrust standing determinations. A conclusion of whether this factor should be included in a standing analysis is not reached by the author. Accordingly, a discussion of this sixth factor is not included in this analysis.

100. 457 U.S. 465, 475 (1982) (consumer of psychological services was allowed to maintain an action under section 4 against a health insurer because the defendant engaged in an unlawful conspiracy and there existed "not the slightest possibility of a duplicative" recovery).

101. *See* United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948).

102. Contracts and conspiracies in restraint of trade, such as group boycotts, are often intentionally inflicted upon the victims. An alleged intent to harm a party is well-exemplified in the subject case *Associated General Contractors* where Associated's alleged anti-competitive activities were directed solely at harming the Union's trade.

to decrease administrative burdens on the courts, dismissing a plaintiff's action before trial because of the potential difficulties of damage apportionment seems to be an unfair procedure to impose on a plaintiff.[103] Moreover, Congress intended section 4 to rigorously promote the private enforcement of antitrust claims, not to impose restraints.[104] The burden of formulating mathematical equations to approximate the amount of antitrust injury sustained by the victim should rest on the legislature and not the plaintiff.[105]

Second, the Supreme Court's use of the tenuous nature of the plaintiff's claim as a factor for standing also warrants criticism. Although the Supreme Court has previously used the "speculative, abstract, or impractical" nature of a claim as a basis for denying standing,[106] a determination of this kind needs more information than the pleadings provide. As Justice Marshall correctly pointed out in his dissent, if facts exist "to support an inference of causation," the substance of a claim should be decided by trial.[107]

The final factor employed by the Court which appears unsatisfactory is the nature of the plaintiff's injury. Specifically, the Court asks whether the alleged injury falls within the type the antitrust laws sought to protect and redress.[108] To maintain an action, a plaintiff should only have to sufficiently *allege* the necessary requirements to state a claim for relief, the plaintiff should not have to *prove* the merits of his claim in the pleadings.[109] A plaintiff should be entitled to present at trial, inter alia, expert testimony explaining the economic ramifications of the defendant's alleged anti-competitive act. Without expert testimony and other fact-finding techniques, the courts

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103. *See Malamud*, 591 F.2d at 1149.

104. The initial House debates reveal that private damage actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws." 51 CONG. REC. 9073 (1914) (remarks of Rep. Webb); *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

105. An example of the misuse of the damage apportionment factor was seen here in *Associated General Contractors*. The Court weighed this factor against the Union because the District Court would "face problems" of identifying damages if the Union was allowed to maintain the action. Judges and juries, however, regularly "face problems" of awarding damages. Therefore, except where serious difficulties of damage apportionment are present, see *Illinois Brick*, 431 U.S. at 737, and *Hanover Shoe*, 392 U.S. at 493, it would appear that an antitrust claim should not be dismissed at the pleading stage, even partly because the courts will "face problems" of damage assessment.

106. *McCready*, 457 U.S. at 475, n.11.

107. *Associated General Contractors*, 103 S. Ct. at 916 (Marshall, J., dissenting) (quoting Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969)). *See* Berger & Bernstein, *supra* note 1, at 854-55:

> To deny standing on grounds of speculative injury is to prejudge the merits of the plaintiff's claim for damages, for speculativeness of injury implies inability to prove that injury exists. But issues of adequacy of proof are ordinarily handled through motions for summary judgment or for directed verdict. An antitrust plaintiff should not be denied an opportunity to present all its evidence on causation and extent of injury before the court rules on whether its allegations are sufficient as a matter of law; indeed, such a denial is contrary to accepted notions of civil procedure.

Id.

108. This analysis is coined the *Brunswick* test. *See supra* notes 70-77 and accompanying text.

109. For a discussion of the problems created by incorporating substantive antitrust law in standing determinations, see Berger & Bernstein, *supra* note 1, at 835-40. *See Malamud*, 521 F.2d at 1149-50; *But see* Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted.").

are deprived of knowledge which could aid in their evaluation of whether the alleged injury is one the antitrust laws were meant to protect.

C. *Creating a Double Standard*

In *Associated General Contractors*, the Court applied its standing determination factors to the Union's claim that Associated conspired to weaken and destroy the Union. The factor which the Court apparently weighed most heavily in its decision was the nature of the alleged injury.[110] The majority concluded that the Union's injury was not of a type which the antitrust laws intended to redress.[111] This conclusion, however, is inconsistent with prior case law involving the clash between labor unions and the antitrust laws.[112]

1. Labor and the Antitrust Laws

Posed with a dilemma that labor unions, in theory and practice, were conspiracies in restraint of trade, Congress had to harmonize labor policies with policies favoring free competition.[113] Reaching a pro-labor solution, Congress explicitly exempted the collective bargaining activities of labor organizations from the antitrust laws by enacting two provisions of the Clayton Act: section 6[114] and section 20.[115] Section 6 provides that labor unions are not unlawful, and that neither the unions nor their members may be considered illegal combinations or conspiracies in restraint of trade. Section 20 prohibits courts from issuing injunctions against certain specified activities arising from labor disputes. Enacting these pro-labor statutory clauses, Congress has clearly expressed its intention to promote labor organizations within the framework of the antitrust laws.

Although these clauses exempt labor from specified anti-competitive violations, the Supreme Court has held that certain labor union activities are punishable under the antitrust laws.[116] One method used to determine

110. *Associated General Contractors*, 103 S. Ct. at 908.

111. *Id.* at 913.

112. An in-depth discussion of the relationship between labor organizations and the antitrust laws is beyond the scope of this comment. The Court's decision to deny the Union standing, however, is so clearly adverse to previous Supreme Court decisions which allow, under similar circumstances, an employer to maintain an antitrust action against a union, that a brief discussion of the *Associated General Contractors* anti-labor decision is warranted. For additional discussions on the interplay between union activities and the antitrust laws, see generally, P. AREEDA & D. TURNER, 1 ANTITRUST LAW § 229 (1978); L. SULLIVAN, *supra* note 13, at § 237 (1977); Casey & Cazzillio, *Labor-Antitrust: The Problems of* Connell *and A Remedy that Follows Naturally*, 1980 DUKE L.J. 235; Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); Scheinholtz & Kettering, *Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347 (1983).

113. *See* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254 (1955) ("The purpose and effect of every labor organization is to eliminate competition in the labor market."); Meltzer, *Labor Unions, Collective Bargaining and The Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Comment, *Antitrust Law in Colorado: Back on Track*, 60 DEN. L.J. 645, 652 (1983).

114. 15 U.S.C. § 17 (1976 & Supp. V 1981).

115. 15 U.S.C. § 20 (1976 & Supp. V 1981).

116. *See, e.g.*, Connell Constr. Co. v. Plumber & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 625-36 (1975); United Mine Workers v. Pennington, 381 U.S. 657, 662-69 (1965); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806-11 (1945).

whether the labor activity is exempt from the antitrust laws has been to draw a line between those anti-competitive acts which result from a typical labor dispute[117] and those which occur by reason of a concerted action or agreement outside the normal bargaining arena.[118] If an antitrust injury emerges from a typical "wage, hour or conditions" labor dispute between a union and non-union party, the claim is exempt from the antitrust laws.[119]

2. A Weak Analysis

In *Associated General Contractors* the Court should have addressed the distinction between the two types of circumstances which surround an anticompetitive act involving union and non-union parties. If the majority had properly analyzed the Union's claim,[120] the Court would have recognized that the Union's alleged injury was not a result of a typical labor dispute. A labor-related conspiracy, especially one which involves *coercive* activities,[121] restraining the trade of a particular business is, without doubt, a *concerted action* not exempt from the antitrust laws.[122] Therefore, because 1) the Union alleged that the defendants conspired to restrain the Union's trade,[123] 2) for purposes of standing, all facts alleged are assumed to be provable,[124] and 3) that a concerted anti-competitive act by a labor employer is *not* within the antitrust exemption for labor activities, it appears that the Union did sufficiently allege an injury which falls within the protection of the antitrust laws.

CONCLUSION

Since 1910,[125] the framework used for antitrust standing decisions has branched off in many directions. Until *Associated General Contractors*, there were four different tests[126] applied to section 4 standing cases by the district and circuit courts. Recognizing that these courts were interpreting the same federal statute, it is fair to say that the field of antitrust standing was in a

117. P. AREEDA & D. TURNER, *supra* note 112, at 189 (1978) ("The antitrust laws apply as usual to agreements among employers concerning wages and working conditions *unless* intimately related to genuine collective bargaining with a union embracing the workers of the agreeing employers.") (emphasis added); L. SULLIVAN, *supra* note 13, at 727-28 (1977) ("There are subjects, such as wages, hours and working conditions, which are mandatory subjects of collective bargaining. Where a union and employers in a bargaining relationship agree on these, no antitrust violation occurs. . . .")

118. *See, e.g., Connell*, 421 U.S. at 622 (citing *United Mine Workers*, 381 U.S. at 662).

119. *See supra* note 117.

120. The Supreme Court failed in its analysis to cite any precedent which supported its conclusion that a long labor-related relationship exempted a non-union party from an antitrust violation directed at a labor union. *See Associated General Contractors*, 103 S. Ct. at 910.

121. The Union in *Associated General Contractors* alleged that it suffered injuries as a result of the defendants' coercion of landowners and other third parties. *See supra* note 52.

122. California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 532-36 (the Union's claim did not fall within either the statutory or non-statutory antitrust exemptions afforded to certain labor activities).

123. *See supra* note 57.

124. *Associated General Contractors*, 103 S. Ct. at 902 "As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint."

125. Loeb v. Eastman Kodak, Co., 183 F. 704 (3d Cir. 1910).

126. Direct injury, target area, zone of interests, and matrix of factors. *See supra* text accompanying notes 21-45.

state of disarray. The Supreme Court in *Associated General Contractors*, however, has begun to shape a definitive antitrust standing policy.

Confronted with four standing doctrines currently in use by the circuit courts—direct injury, target area, zone of interests, and matrix of factors—the Court correctly selected a workable approach to antitrust standing determinations by creating their own version of the balancing test. The balancing method is an extremely flexible test.[127] This flexibility is particularly desirable in antitrust litigation because of the subject matter's inherent complexity. The Court's selection of a balancing test, therefore, should provide a cogent framework for antitrust standing analysis.

The Court's balancing test hinged on six different factors. Two of the factors—the possibility of duplicative recovery and intent—are important factors to evaluate to determine whether the plaintiff is a proper party to maintain an action under section 4. Both of these factors have been well-established in case law as important considerations in weighing a plaintiff's antitrust standing status.[128]

Unfortunately, however, three of the factors which the majority articulated as controlling in the standing analysis appear to be unsatisfactory, and thus, are subject to criticism. Two of these three factors—the nature of the injury and the speculative character of the claim—delve into the *merits* of an antitrust claim. It is unwise to place obstacles of substantive law in front of a plaintiff during the pleading stage because of the possibility that these obstacles will deter potential plaintiffs from bringing actions against antitrust violations. Any reduction in the private enforcement mechanism of American antitrust law is an injury to our free enterprise system.

The Court's use of the difficulty of damage apportionment is also an unsatisfactory factor for determining standing. In antitrust cases, the federal courts inevitably face problems of apportioning the amount of antitrust injury sustained by the victim because of the economic complexities involved in anti-competitive acts. A plaintiff should not be denied standing merely because the court envisions difficulty in awarding damages.[129]

The Court's decision in *Associated General Contractors* to deny the Union standing was not only adverse to Congress's explicit attempts to harmonize labor policies with antitrust policy, but also inconsistent with precedent recognizing that certain labor-related antitrust violations are not exempt from the antitrust laws. The majority wrongly concluded that the labor union's injury was not within the type of injury the antitrust laws sought to protect. The alleged injury was a conscious, anti-competitive act by the defendant. Ample precedent can be cited supporting the proposition that, although normal labor disputes involving wage, hour and working conditions do not warrant an antitrust action, concerted anti-competitive acts outside these typical labor dispute areas are violative of the antitrust laws. Reconciling case law with the alleged facts of the claim, the finding in *Associated General Contractors*

127. *See supra* note 97.

128. *See supra* text accompanying notes 99-102.

129. *See supra* text accompanying notes 103-09.

that the Union's alleged injury was not protected by the antitrust laws, was clearly unsupported.

By dismissing the Union's antitrust claim before the Union had its day in court, the Supreme Court has possibly reduced the capacity of labor organizations to maintain treble damage actions against employers who violate the antitrust laws. Whether the *Associated General Contractors* decision will unfold a trend by the Court to dilute pro-labor policies remains to be seen. In the meantime, although *Associated General Contractors* sets forth a much needed skeleton framework for antitrust standing evaluations, the decision to deny a labor union standing to maintain a antitrust suit under section 4 of the Clayton Act will inevitably have some damaging effects on labor organizations when they next collide with the antitrust laws.

Clifford Chanler

COMMISSIONER V. TUFTS: A SOUND DECISION

INTRODUCTION

For federal income tax purposes, gross income includes the net gain or loss derived from dealings in property.[1] The amount of gain or loss is the difference between the taxpayer's adjusted basis[2] in the property and the amount realized upon disposition of the property.[3]

Consider a partner in an apartment development financed almost entirely with a nonrecourse mortgage loan.[4] The property is worth about $400,000 less than the unpaid debt at disposition. The Third Circuit, based on its decision in *Millar v. Commissioner*,[5] would find the amount realized to be the the full amount of the unpaid debt, assumed by the new owner. Treasury Regulation 1.1001-2[6] is similarly dispositive, if it is entitled to effect.[7] Recently, however, in *Commissioner v. Tufts*,[8] the Fifth Circuit majority disagreed with the Third Circuit's decision in *Millar* and ignored the regulation.[9] The United States Supreme Court granted *certiorari* to resolve this

1. I.R.C. § 61(a)(3) (1976). *See also* I.R.C. §§ 1201-1256 (1976 & Supp. V 1981 & West Supp. 1983) (on treatment of, and rules for determining, capital gains and losses).

2. I.R.C. §§ 1011(a), 1012, 1014, 1016(a)(1)-(2) (1976 & Supp. V 1981).

3. I.R.C. § 1001(a) (1976 & Supp. V 1981). The term "amount realized" is defined in I.R.C. § 1001(b) as "the sum of any money received plus the fair market value of the property (other than money) received." I.R.C. § 1001(b).

4. A mortgage conveys an interest in property to secure the performance of an obligation. If the debt is paid according to the terms of the note, the creditor-mortgagee's lien is discharged, i.e., the security interest is extinguished.

A nonrecourse mortgage conveys a security interest in the property, but the mortgagor does not personally oblige himself to pay the debt that the property secures. If there is default, the creditor-mortgagee's only remedy is to foreclose his lien on the property. The creditor-mortgagee has no recourse against the mortgagor for any of the debt not satisfied by the value of the property. The nonrecourse mortgage serves to remove the mortgagor's other assets from the reach of the creditor-mortgagee. *See* G. OSBORNE, MORTGAGES § 103 n.22 (1970); Note, *Federal Income Tax Treatment of Nonrecourse Debt*, 82 COLUM. L. REV. 1498, 1498 & n.1 (1982).

5. 67 T.C. 656 (1977), *aff'd in part. part*, 577 F.2d 212, 215 (3d Cir.), *cert. denied*, 439 U.S. 1046 (1978). *See infra* notes 34-41 and accompanying text.

6. Treas. Reg. § 1.1001-2 (1980). Section 1.1001-2 reads in pertinent part: "The fair market value of the security [mortgaged property] at the time of sale or disposition is not relevant for the purposes of determining under [the amount realized paragraph] of this section the amount of liabilities from which the taxpayer is discharged or treated as discharged." § 1.1001-2(b). The regulation was promulgated on Dec. 11, 1980, during the pendency of *Commissioner v. Tufts* before the court of appeals. Tufts v. Commissioner, 651 F.2d 1058, 1065 n.1 (5th Cir. 1981), *rev'd*, 103 S. Ct. 1826, 1833 n.9 (1983). The facts hypothesized are based on the *Tufts* facts.

7. The regulation is interpretive of I.R.C. § 1001(b). *See* Treas. Reg. § 1.1001-2, T.D. 7741, 1981-1 C.B. 430, 430-31. The regulation will not be given effect if it is "unreasonable and plainly inconsistent with the revenue statutes." Fulman v. United States, 434 U.S. 528, 533 (1978) (quoting Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948)). *See also* Bingler v. Johnson, 394 U.S. 741, 750 (1969) (applying the same statement).

8. 651 F.2d 1058 (5th Cir. 1981), *rev'd*, 103 S. Ct. 1826 (1983).

9. *See* 651 F.2d at 1060, 1063-64 n. 9. Judge Williams, in his concurring opinion, would hold the regulation to be in conflict with the "plain language of the statute," because the value of the release must correspond to the value of the property securing the nonrecourse indebtedness. 651 F.2d at 1065 (Williams, J., concurring); *but see infra* notes 138-41 and accompanying text. Therefore, the regulation, regardless of its interpretive effect, is invalid, according to Judge Williams. 651 F.2d at 1065.

conflict between the circuits.

On May 2, 1983, the Supreme Court ruled against the taxpayer's argument that amount realized should be limited to the fair market value of the property in question. In *Tufts*, the Supreme Court decided that when a taxpayer disposes of property encumbered by a nonrecourse obligation, the outstanding amount of the obligation must be included in the amount realized for the purposes of gain or loss determination, and that the fair market value of the property is irrelevant to this calculation.[10]

This comment will examine the evolution of the principles forming the context of the *Tufts* decision, and it will critique the Supreme Court's application of those principles. As this critique will illustrate, the Supreme Court not only reached the correct result, but the Court reached that result for sound reasons.

I. BACKGROUND

A. *Foundation of the* Tufts *Controversy*

Whether the value of the property is a ceiling on amount realized is vitally important to owners of unprofitable real estate developments encumbered by a nonrecourse mortgage incurred to purchase or improve the property.[11] A nonrecourse mortgage limits the personal liability of an owner while it allows him the full cost as a depreciable basis.[12] But if an owner's amount realized is a function of the unpaid debt and not of the property's value, he could incur a tax *gain* on disposition of the property that has lost value since acquisition.[13]

There is something "counter-intuitive"[14] about recognizing a gain when the property has declined in value and, as in *Tufts*, the taxpayer received no cash from the sale.[15] It is arguable that, if the property does in fact decline in value as depreciation deductions presume, a taxpayer should not need to recognize those deductions as a gain.[16]

In addition to this apparent inconsistency when value is not a limitation on amount realized, there existed at the time of the *Tufts* appeal to the Supreme Court a confusion of principles. There appeared to be two rationales available to support the rule that the amount realized includes the full

10. 103 S. Ct. at 1836.

11. *Cf.* Perry, *Limited Partnerships and Tax Shelters: The* Crane *Rule Goes Public*, 27 TAX. L. REV. 525, 528 (1972) (Because the mortgage is included in the cost basis, a taxpayer can take depreciation charges in excess of the cash contribution. This is significant to taxpayers investing in property subject to a prior lien.).

12. I.R.C. § 1012 (1976). *See infra* text accompanying note 18. *But see, e.g.*, Gladding Dry Goods, 2 B.T.A. 336, 338 (1925) (holding a capital investment by the taxpayer, not just ownership, is required before depreciation is allowed). This notion of requiring capital investment was effectively overruled by Crane v. Commissioner, 331 U.S. 1 (1947). *See* Note, *Federal Income Tax Treatment of Nonrecourse Debt*, 82 COLUM. L. REV. 1498, 1512-13 & n.91 (1982).

13. *See generally* Halpern, *Footnote 37 and the* Crane *Case: The Problem That Never Really Was*, 6 J. REAL EST. TAX'N 197, 199 (1978) (concerning failing tax shelters).

14. Bittker, *Tax Shelters, Nonrecourse Debt, and the* Crane *Case*, 33 TAX. L. REV. 277, 277 (1978).

15. 103 S. Ct. at 1829. *See infra* text accompanying note 84.

16. *See Tufts*, 651 F.2d at 1060-61 n.4.

amount of unpaid debt: the economic benefit theory and the tax benefit theory. A conflict between the circuits was probable.

B. *The Development of the Law*

For a complete understanding of the *Tufts* opinion, a foundation is needed. The economic benefit and tax benefit theories evolved in two intertwined lines of cases which will be discussed in four segments. The tax benefit line of decisions began with the Supreme Court holding in *Crane v. Commissioner*.[17]

1. *Crane*: Basis and Amount Realized Include Nonrecourse Mortgage

The *Crane* case stands for two rules. First, basis includes nonrecourse debt when incurred by the taxpayer's transferor and assumed by the taxpayer.[18] Second, amount realized also includes the nonrecourse debt remaining unpaid at the time of transfer.[19] The Supreme Court reached the latter conclusion based on the following: 1) "property" in the definition of amount realized[20] should mean the same as in the definition of basis,[21] because of the functional relation between basis and amount realized;[22] and, 2) the absence of personal liability is of no consequence, because a taxpayer who transfers property subject to a mortgage receives a benefit as real and substantial as if the mortgage were discharged, or as if it were a personal debt assumed by another.[23] Thus, the taxpayer is faced with the same capi-

17. 331 U.S. 1 (1947).

18. 331 U.S. at 11. In 1966, this rule was extended by the Tax Court to *new* nonrecourse debt known as purchase-money mortgages. Mayerson v. Commissioner, 43 T.C. 340, 351 (1966). The absence of personal liability was immaterial. *Id.* at 351-52. *See also* Bolger v. Commissioner, 59 T.C. 760, 771 (1973) (a 100% financed acquisition and a minimal cash flow did not matter for the right to a depreciable basis). For a criticism of *Mayerson* see Del Cotto, *Basis and Amount Realized Under* Crane: *A Current View of Some Tax Effects in Mortgage Financing*, 118 U. PA. L. REV. 69, 71-75 (1969). For a general criticism of including nonrecourse debt in basis see Note, *supra* note 12, at 1511-14.

Other types of liens are properly included in basis. *See, e.g.*, Blackstone Theatre Co. v. Commissioner, 12 T.C. 801, 805 (1949) (unpaid tax liens to which the property was bought subject are included in basis, no matter when the tax liens are ultimately paid or for how much).

This comment deals only with the extent of the inclusion of nonrecourse debt in amount realized. On the basis rule of *Crane* there is extensive literature. *See, e.g.*, Friedland, Tufts & Millar: *Two New Views of the* Crane *Case and Its Famous Footnote*, 57 NOTRE DAME LAW. 510, 513-15 (1982); Perry, *Limited Partnerships and Tax Shelters: The* Crane *Rule Goes Public*, 27 TAX. L. REV. 525, 527-42 (1972); Simmons, *Nonrecourse Debt and Basis: Mrs. Crane Where Are You Now?* 53 S. CAL. L. REV. 1, 6-14 (1979).

19. 331 U.S. at 13.

20. I.R.C. § 1001(b) (1976 & Supp. V 1981).

21. I.R.C. § 1014(a)(1) (1976 & Supp V 1981). If the *property* to be valued on the date of acquisition is the property free of liens, then the *property* priced on a subsequent sale must be the same thing. 331 U.S. at 12. *See* Maguire v. Commissioner, 313 U.S. 1, 8 (1941).

22. 331 U.S. at 12. The Court did not explain what "functional relation" means. The Court had already concluded that *property* in § 1014(a)(1), defining basis, refers to the value of the property undiminished by mortgages. *Id.* at 11.

23. *Id.* at 14. For criticism on the identification of personal liability and nonrecourse liability, see Bittker, *supra* note 14, at 281-82. *See also infra* notes 138-41 and accompanying text on comparison of this idea with debt relief cases.

In this case, the Supreme Court also implied what the rule would be if the value of the property were less than the debt: the amount realized would be the value. *See* 331 U.S. at 14 n.37 (dictum).

tal gain treatment regardless of the type of mortgage lien.

The taxpayer in *Crane* had, during her six years of ownership, claimed $25,000[24] of the allowable $28,045 depreciation.[25] The Court appeared to want to prevent a double deduction that it believed would result if the amount realized did not include the amount of unpaid debt.[26] This tax benefit reasoning was later developed in *Parker v. Delaney*[27] and *Millar v. Commissioner*.[28]

2. *Parker* and *Millar*: Tax Benefit Theory

The tax benefit theory concerns inclusion of unpaid debt in amount realized to account for the depreciation deductions taken on a basis that included the debt. In *Parker v. Delaney*, the First Circuit held that where the owner, who had acquired the property subject to a mortgage, conveyed the property to a mortgagee in satisfaction of the debt, it was a disposition for the purposes of computing a gain or loss.[29] Therefore, *Crane* controlled on determining the amount realized.[30] As in *Crane*, a taxpayer here took depreciation deductions on a basis equal to the amount of the mortgage.[31] This reduced his basis to $31,291 less than the amount of the debt when conveyed to the mortgagee.[32] The *Parker* decision holds the difference is a taxable gain, and represents the amount of depreciation taken in excess of the taxpayer's capital investment.[33]

In *Millar*, the taxpayers, upon receipt of loan funds from a corporate organizer, executed nonrecourse notes secured solely by their stock in a Subchapter S corporation.[34] They simultaneously contributed the funds to the capital of the corporation, increasing their bases in the stock. After a period of substantial tax losses that benefitted the shareholders, the stock was repossessed for default on the notes.[35]

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24. 331 U.S. at 3 n.2. In *Crane*, the taxpayer acquired the property from a decedent.

25. *Id.* at 4.

26. *Id.* at 15-16. "The crux of this case, really, is whether the law permits her to exclude allowable [depreciation] deductions from consideration in computing gain. We have already showed that, if it does, the taxpayer can enjoy a double deduction, in effect, on the same loss of assets." *Id.* In other words double deduction refers to recognizing a loss on the sale in addition to the depreciation claimed.

27. 186 F.2d 455 (1st Cir. 1950), *cert denied*, 341 U.S. 926 (1951).

28. 577 F.2d 212 (3d Cir.), *cert. denied*, 439 U.S. 1046 (1978).

29. 186 F.2d at 457, 459. *See* I.R.C. § 1001(a) (1976 & Supp. V 1981).

30. 186 F.2d at 458.

31. *Id.* at 457.

32. *Id.* at 458.

33. *See id.* at 459. For criticism of the *Parker* holding see Note, *supra* note 12, at 1505.

34. 577 F.2d at 213. A qualifying Subchapter S corporation is not taxed as an entity, but instead, its profits and losses flow through to its shareholders in proportion to each shareholder's interest. *See* I.R.C. §§ 1363(a), 1366(a) (West Supp. 1983). Section 1366(d)(1) limits losses deductible each year by a shareholder to the adjusted basis of his stock plus any debt of the corporation to the shareholder.

35. Millar v. Commissioner, 540 F.2d 184, 185 (3d Cir. 1976) (remanding the case to the tax court). A repossession of property securing a debt constitutes a taxable sale or exchange. *See* Helvering v. Hammel, 311 U.S. 504, 510 (1941); R. O'Dell & Sons Co. v. Commissioner, 169 F.2d 247, 248 (3d Cir. 1948); Unique Art Mfg. Co. v. Commissioner, 8 T.C. 1341, 1342-43 (1947). *See also* Freeland v. Commissioner, 74 T.C. 970 (1980) (applying the same rule in an abandonment of property to a mortgagee).

The Third Circuit emphasized the tax benefit reasoning[36] with which the *Crane* opinion concluded.[37] The taxpayers' bases were reduced by the passed-through operating losses of the corporation. These losses were a substantial tax benefit.[38] In surrendering their devalued stock[39] in exchange for the cancellation of the mortgage, the taxpayers clearly realized a taxable gain equal to the value of the cancelled obligation less the adjusted basis of their surrendered stock.[40]

Thus, in both *Parker* and *Millar* the courts followed *Crane*. The decisions emphasize that the gain represents the depreciation claimed in excess of amortization of the nonrecourse debt secured by the property ultimately surrendered to the mortgagee.[41]

3. *Lutz & Schramm Co.*: Economic Benefit Theory

The economic benefit theory concerns accounting for loan proceeds in amount realized because the loan proceeds are untaxed. Before *Crane* and its infamous footnote 37,[42] the United States Tax Court's decision in *Lutz & Schramm Co. v. Commissioner*[43] began an important line of cases. Lutz & Schramm Company, subsequent to purchasing its property, mortgaged it to secure a new loan of $361,000.[44] After financial difficulties the taxpayer transferred the mortgaged property to the creditor in full satisfaction of the mortgage.[45] At the time of the transfer, the property had been depreciated to an adjusted basis of $257,435[46] while its value had declined to $97,000.[47]

The court held that the facts of no personal liability and a low fair market value were immaterial,[48] and the amount realized equaled the unpaid debt.[49] The court reasoned that the issue was not whether the taxpayer realized income from the discharge of indebtedness,[50] but whether the taxpayer realized a gain upon disposition of the property.[51] The net result was that the taxpayer received $300,000 without restriction[52] by mortgaging property with a basis of only $257,435, and by making no repayment until

36. *See* 577 F.2d at 215.

37. *See supra* note 26 for the *Crane* text implying a tax benefit to the taxpayer.

38. 577 F.2d at 215. Subchapter S losses are analogous to depreciation deductions. *See* Comment, Millar: *Requiem for* Crane's *Footnote 37*?, 41 U. PITT. L. REV. 343, 345-46 (1980).

39. The value of the stock was less than the unpaid debt. 577 F.2d at 215.

40. *Id.* at 215.

41. *See also* Rev. Rul. 76-111, 1976-1 C.B. 214, 215 (value of depreciated property disposed of to mortgagee is immaterial; unpaid debt cancelled upon the transfer is the amount realized).

42. *See supra* note 23.

43. 1 T.C. 682 (1943).

44. *Id.* at 684.

45. *Id.* at 685.

46. *Id.* at 689.

47. *Id.* at 685.

48. *Id.* at 689.

49. *Id.*

50. *See* Bialock v. Commissioner, 35 T.C. 649 (1961) (debts satisfied by transfer of all assets of debtor business; result similar to *Lutz & Schramm*, but based on discharge of indebtedness principle because creditor was *not* a mortgagee).

51. 1 T.C. at 689.

52. The taxpayer had transferred certain property to the creditor to reduce the debt to $300,000. *Id.* at 684.

A reinvestment of the borrowed funds in capital improvements to the property would,

foreclosure.[53] Thus, the economic benefit theory was born.[54]

The principle of *Lutz & Schramm* was extended in *Mendham Corp. v. Commissioner*[55] and *Woodsam Associates, Inc. v. Commissioner*[56] to the situation where property is acquired subject to the prior owner's post-acquisition mortgage. In both cases the courts held that the gain upon foreclosure equaled the unpaid mortgage less the basis adjusted for the taxpayer's depreciation deductions.[57] The Tax Court in *Mendham* emphasized that the gain on the sale must reflect the ultimate profit from the entire operation.[58] The *Woodsam* court concluded that the value of the property at foreclosure was immaterial.[59]

Crane's economic benefit principles were applied in *Johnson v. Commissioner*.[60] The taxpayer had borrowed $200,000 against his highly appreciated securities[61] just before a gratuitous transfer of the stock to his children.[62] The notes were then re-executed to relieve the taxpayer of any personal liability.[63]

The Sixth Circuit held that the $200,000 was gross income on a clear economic benefit theory, noting that Dr. Johnson had received $200,000 free and clear of any obligation to repay that amount from any property in his possession.[64] It made no difference to what use the $200,000 was put, even if it was used to pay the gift tax.[65] The court then found *Crane* dispositive: Johnson had shed a $200,000 debt by transferring the encumbered stock to his children, so his amount realized is that debt, regardless of the fact that he was not personally liable.[66]

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however, justify an increase in basis. *See* I.R.C. § 1016(a)(1) (1976 & Supp. V 1981); Treas. Reg. § 1.1016-2 (1960).

53. 1 T.C. at 689.

54. For thorough discussions of the economic benefit theory, see Halpern, *supra* note 13, at 208-20 (1979); Simmons, *Nonrecourse Debt and the Amount Realized: The Demise of* Crane*'s Footnote 37*, 59 OR. L. REV. 3, 16-18 (1980).

55. 9 T.C. 320 (1947).

56. 198 F.2d 357 (2d Cir. 1952).

57. *Woodsam*, 198 F.2d at 359; *see Mendham*, 9 T.C. at 325.

58. 9 T.C. at 324. Two commentators have noted their approval of the decisions in *Lutz & Schramm* and *Mendham*. *See* Ginsburg, *The Leaky Tax Shelter*, 53 TAXES 719, 730 (1975); Simmons, *supra* note 54, at 13-14 (1980).

59. 198 F.2d at 359.

60. 495 F.2d 1079 (6th Cir.), *cert. denied*, 419 U.S. 1040 (1974).

61. *Id.* at 1080. The taxpayer's basis in the stock equalled approximately $10,000, and the stock was worth at least $200,000. *See id.* at 1080 & n.2.

62. *Id.* at 1080.

63. *Id.*

64. *Id.* at 1083.

65. *Id.* The taxpayer did argue that the $150,000 he paid in gift tax should escape taxation. *Id.* at 1081. This argument was disposed of by the Supreme Court in 1929. *See* Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 729 (1929). *Accord* Guarantee Title & Trust Co. v. Commissioner, 313 F.2d 225, 228 (6th Cir. 1963); Schaeffer v. Commissioner, 258 F.2d 861, 864 (6th Cir. 1958); Malone v. United States, 326 F. Supp. 106, 112 (N.D. Miss. 1971), *aff'd*, 455 F.2d 502 (5th Cir. 1972).

66. 495 F.2d at 1083. The court of appeals recognized the absence of personal liability by a taxpayer was persuasive but not dispositive. *Id. See also* First Nat'l Indus., Inc. v. Commissioner, 404 F.2d 1182 (6th Cir. 1968), *cert. denied*, 394 U.S. 1014 (1969) (donor of property subject to a mortgage was charged with capital gain for the gift).

4. *Delman*: The Most Recent Case Resting on the *Crane* Tax Benefit Principle

In *Estate of Delman v. Commissioner*,[67] taxpayers who had purchased equipment subject to a nonrecourse mortgage defaulted and the seller-mortgagee repossessed the goods.[68] At the time of foreclosure, the unpaid debt was $1,182,542, and the taxpayers' basis had been depreciated to $504,625.[69] The value of the equipment had declined to $400,000.[70] The Tax Court held that the partners collectively realized a gain of $1,182,542 minus $504,625, equalling $677,917. The value of the property was irrelevant.[71]

The court relied on *Lutz & Schramm*, *Mendham*, *Woodsam*, *Millar*,[72] and the Tax Court's decision in *Tufts*.[73] As in *Millar* and *Tufts*,[74] the taxpayers here benefitted from the nonrecourse loans by including them in basis and consequently in depreciation deductions.[75] These depreciation deductions supplied the taxpayers with tax losses.[76]

The taxpayers argued that cases applying the tax benefit rule[77] were inapplicable because those decisions required an actual receipt of funds or a discharge of liability increasing the taxpayer's net worth before income resulted.[78] The court countered by applying *Crane*: no such requirements exist when a sale or exchange of property subject to a nonrecourse liability takes place.[79] Neither element was present in *Crane*. The *Crane* court had concluded that the nonrecourse liability was properly included in amount realized.[80]

The taxpayers also argued that neither the instant facts nor those in *Millar* or *Tufts* involved new money obtained by nonrecourse financing subsequent to the initial purchase, and therefore the fair market value irrelevancy rule, upheld in *Lutz & Schramm*, *Mendham*, and *Woodsam*, is inapplicable.[81] The court responded that those decisions rest on the economic benefit theory and the economic benefit achieved by subsequent mortgaging can also be achieved by a purchase-money mortgage, as in the instant case.[82]

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67. 73 T.C. 15 (1979).

68. *Id.* at 25.

69. *Id.* at 27-28.

70. *Id.* at 28.

71. *See id.* at 37.

72. *Id.* at 28.

73. *Id.* Commissioner v. Tufts, 70 T.C. 756 (1978), *rev'd*, 651 F.2d 1058 (1981), *rev'd*, 103 S. Ct. 1826 (1983).

74. *See infra* text accompanying note 91.

75. 73 T.C. at 30.

76. *Id.*

77. *See, e.g.*, Tennessee Carolina Transp. Inc. v. Commissioner, 582 F.2d 378 (6th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

78. 73 T.C. at 30 n.3.

79. *Id.* *See infra* note 123 and accompanying text.

80. 73 T.C. at 30 n.3 (interpreting the *Crane* decision).

81. *Id.* at 30-31 n.5.

82. *Id.* (dictum).

5. Summary of the Law Before *Tufts*

The existing rules and reasoning prior to the court of appeals decision in *Tufts* can be easily summarized. A tax benefit results from the debt's inclusion in basis which in turn contributes to depreciation deductions. Therefore where property is acquired subject to a mortgage or by means of a new mortgage, it is fair to include in amount realized the amount of debt unpaid, because the difference between it and adjusted basis represents the amount of depreciation claimed in excess of the loan principal paid. The value of the property does not matter.

Depreciable basis does not include the mortgage amount when property is mortgaged for cash subsequent to acquisition. Nevertheless, the unpaid mortgage debt must be included in amount realized to avoid an untaxed economic benefit because the loan proceeds were never taxed. As with the tax benefit theory, the decline in the property's value does not reduce the untaxed economic benefit.

II. *COMMISSIONER V. TUFTS*

A. *The Facts*

The taxpayers in *Tufts* were general partners building an apartment complex. They contributed a total of $44,212 of their own money and borrowed $1,851,000 from a bank, securing the debt with a nonrecourse mortgage.[83]

After completion of the apartment complex, a shortfall in revenue caused the partners to convey their interests to an unrelated third party solely in consideration of the selling expenses and the assumption of the nonrecourse mortgage.[84] At this time, the debt was $1,851,500, the value of the property was only $1,400,000, and the partners had depreciated the property down to $1,455,740.[85]

The issue was whether the amount realized is *all* of the unpaid debt or is limited to the value of the property given up. This issue could be determined either by prior judicial interpretation or by the Internal Revenue Code provision[86] concerning the treatment of liabilities to which partnership property is subject if that provision applies to the sale of partnership interests.[87]

B. *The Holding*

First, the Court identified section 752(d) as controlling: liabilities incurred in the sale or exchange of a partnership interest are to be treated in the same manner as liabilities are treated in connection with the sale or ex-

83. 103 S. Ct. at 1828-29.

84. *Id.* at 1829.

85. *Id.* at 1829 nn.1-2.

86. I.R.C. § 752(c) (1976 & Supp V 1981). Section 752 contains a fair market value limitation. *See infra* note 97.

87. The sale of partnership interest is governed by I.R.C. § 752(d) (1976 & Supp V 1981). *See infra* note 97.

change of property not associated with partnerships.[88]

The Court then adopted *Crane*: inclusion of the debt in basis requires inclusion in amount realized. But here, the Court announced as its reasoning that it is the economic benefit of the original loan proceeds, untaxed because of the obligation to repay, that justifies inclusion. This is true regardless of the property's value.[89] Unless the outstanding amount of the mortgage is deemed to be realized upon disposition, the loan proceeds will ultimately go untaxed.[90]

The Court found its rule consistent with Treasury Regulation 1.1001-2(b),[91] Revenue Ruling 76-111,[92] *Millar*,[93] *Mendham*,[94] and *Lutz & Schramm*.[95] Moreover, to permit the taxpayer to limit his amount realized to the value of the property would be to permit recognition of tax loss for which he has suffered no corresponding economic loss.[96]

The partners argued that Congress intended asymmetrical treatment in the sale or disposition of partnership property under section 752(c), because they believed this section should apply to section 752(d).[97] The Supreme Court, as did the Tax Court,[98] met this argument with the legislative history of section 752.[99] The mention of a fair market value limitation occurred only in the context of transactions between the partner and the partnership.[100] The fair market value limitation on the liability to which property is subject does not apply to sales of partnership interests to unrelated third parties.[101]

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88. 103 S. Ct. at 1829. *See infra* note 97.

89. 103 S. Ct. at 1831. *Crane* rests on the Commissioner's policy of identical treatment of recourse and nonrecourse debt, which the *Tufts* Court accepted as reasonable. *Id.* at 1831-32. Thus, the purchaser's assumption of the mortgage was accounted for in the computation of amount realized. *Id.* at 1832 (citing United States v. Hendler, 303 U.S. 564, 566-67 (1938)). The Court declines to call the economic benefit a cancellation of indebtedness. For the Court's discussion see 103 S. Ct. at 1833 n.11.

90. *Id.* at 1832.

91. Treas. Reg. § 1.1001-2(b) (1980). *See supra* note 6.

92. Rev. Rul. 76-111, 1976-1 C.B. 214, 215. *See supra* note 41.

93. *See supra* notes 34-40 and accompanying text.

94. *See supra* notes 55-58 and accompanying text.

95. 103 S. Ct. at 1832-33. The *Lutz & Schramm* decision is discussed *supra* notes 43-54 and accompanying text.

96. 103 S. Ct. at 1834.

97. 103 S. Ct. at 1835. Section 752 reads in part:

> (c) For the purposes of this section [752], a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property. (d) In the case of a sale or exchange of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships.

98. I.R.C. § 752. 70 T.C. at 767-68.

99. H.R. REP. NO. 1337, 83d Cong., 2d Sess., A236, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4017, 4091-98; S. REP. NO. 1622, 83d Cong., 2d Sess., 405, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4621, 4721-33.

100. Treas. Reg. § 1.752-1(c) (1982) is consistent with this limited applicability of section 752(c). *See also* Simmons, Tufts v. Commissioner: *Amount Realized Limited to Fair Market Value*, 15 U.C.D. L. REV. 577, 611-13 (1982) (criticizing the Fifth Circuit's opposite interpretation of this legislative history).

101. 103 S. Ct. at 1836. For a discussion of the § 752 issue see Charyk & Sexton, *Liabilities in Excess of Fair Market Value: The Consequences of the Reversal of the* Tufts *Case*, 10 J. REAL EST. TAX'N 159 (1982); Simmons, *supra* note 100, at 609-16.

The legislative history applied by the Supreme Court is quite direct, and will not be ana-

Justice O'Connor, in her concurring opinion, would reach the same result, but would separate the excess of the debt over the value of the property as income from cancellation of indebtedness, and not include it in amount realized.[102] This would allow *that* part of the gain to be treated as ordinary income instead of as capital gain.[103] She declined to adopt this judicially, though, because of the Commissioner's position in Revenue Ruling 76-111[104] and the decisions in *Millar* and *Delman*.[105] Justice O'Connor recognized the majority's interpretation of the definition of amount realized is defensible, because the reference of section 1001(b) to amount realized *from* the sale or other disposition of property can reasonably be read to allow the collapse of the two aspects of the transaction.[106]

III. ANALYSIS

The results in *Millar*, *Delman*, and *Tufts* in the Tax Court appear to be well reasoned decisions, yet the reasons given have engendered a notion that the tax benefit of the depreciation deductions matters. *Millar*, *Delman*, and the Tax Court in *Tufts* all view *Crane* as a tax benefit rule for recapturing depreciation.[107] That view of the *Crane* reasoning is misleading. *Crane*'s novel term "functional relation" is conclusionary and should not be applied in the unified economic benefit analysis presented by the Supreme Court in *Tufts*. If the Supreme Court in *Tufts* failed, it was in neglecting to firmly discard this misleading emphasis on depreciation in *Millar* and *Delman*.[108]

A. *A Unified Economic Benefit Rule*

Adjusted basis and amount realized form a continuum and function in tandem[109] to account, upon disposal of property previously mortgaged for

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lyzed in this comment. The logic for potential tax shelter abuse was mentioned. *See* 103 S. Ct. at 1836.

102. *Tufts*, 103 S. Ct. at 1836 (O'Connor, J., concurring) (adopting argument of *amicus curiae* submitted by Professor Wayne G. Barnett). *See also* Del Cotto, *supra* note 18, at 87 (advancing same rule). *But see Tufts*, 103 S. Ct. at 1833 n.11 (majority agrees that this could be a justifiable mode of analysis, except the Commissioner has not adopted it and the code does not require it, plus the amicus's approach assumes recourse and nonrecourse debt may be treated identically). *See also infra* note 141.

103. It is important to classify the unpaid debt in excess of the property's value as debt relief, not amount realized, because the former is ordinary income, I.R.C. § 61(a)(12) (1976), while the latter may result in capital gain treatment, I.R.C. § 1202(a) (1976 & Supp. V 1981). *Tufts*, 103 S. Ct. at 1837 (O'Connor, J., concurring).

104. Rev. Rul. 76-111, 1976-1 C.B. 214, reflected in Treas. Reg. § 1.1001-2 (1980). *See supra* notes 6, 41.

105. *See supra* notes 34-41, 67-82 and accompanying text. *See also* Peninsula Properties Co. v. Commissioner, 47 B.T.A. 84, 92 (1942) (unsecured debt settled at a discount by transfer of securities; amount realized reflects debt relief but is a capital gain).

106. 103 S. Ct. at 1838 (O'Connor, J., concurring).

107. *See, e.g.*, *Tufts*, 70 T.C. at 764; *see supra* text accompanying notes 34-41, 67-82. At least two commentators view the tax benefit aspect of *Crane* and, therefore, the reasoning in *Millar*, *Delman*, and *Tufts* in the Tax Court, as correct. *See* Bittker, *supra* note 14, at 282; Friedland, Tufts *and* Millar: *Two New Views of the* Crane *Case and Its Famous Footnote*, 57 NOTRE DAME LAW. 510, 526-28 (1982).

108. *See* 103 S. Ct. at 1832 n.8.

109. *See* Sanders, *Sup. Ct., Ending* Crane *Controversy, Says Nonrecourse Debt Is Always Part of Sales Price*, 59 J. TAX'N 2, 4 (July 1983); Simmons, *supra* note 54, at 18.

the owner's benefit, for that original untaxed[110] accession to that property[111] or some other property.[112] The exact amount of benefit depends upon how much capital is retained at the end of the transaction compared to how much was invested.[113] Basis, including any reductions for depreciation[114] or Subchapter S losses,[115] and amount realized, including any reductions for payments of principal, together account for the excess of capital extracted from the property transaction over the after-tax capital actually invested.[116]

This rule explains *Lutz & Schramm* and its progeny.[117] None of the loan proceeds have been taxed, so at the close of the mortgage transaction when the debt disappears by conveyance to the mortgagee, the proceeds are ripe for taxation. At this point the economic benefit to the taxpayer becomes ascertainable and equals the amount of previously enjoyed capital that now need not be repaid.

The economic benefit rule fully justifies the results in purchase-money mortgage cases,[118] where the taxpayer or his transferor mortgaged the capital asset to acquire it. The mortgaging enables a tax-free receipt of the capital asset itself, such as real property or securities.[119] The amount of this debt is included in basis because of the obligation to repay,[120] and it is included in amount realized, to the extent it has not been amortized, because the inclusion in amount realized serves to tax the accession to the capital beyond what after-tax capital was committed in the form of repayment of the debt. Otherwise, the gain of capital would escape taxation simply because of the nonrecourse nature of the mortgage.

Millar is illustrative. In *Millar* the taxpayers acquired the Subchapter S stock without taxation and they enjoyed this capital asset by having the tax losses pass through to their own tax returns,[121] sheltering other income from taxation. They clearly acquired and enjoyed a capital asset, so at its disposal to the mortgagee, their gain properly reflected the difference between the capital extracted and their own capital committed to the asset, their amortization of the mortgage. The decline in the property's value did not affect that excess of capital extracted over capital invested, and thus the value at the time of foreclosure was irrelevant. Exactly the same rationale applies in *Delman* where, because the taxpayers owned the business assets directly as

110. Loan proceeds are not taxable. *See* Popkin, *The Taxation of Borrowing*, 56 IND. L.J. 43, 43 & n.1 (1980); 1 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 5.12 (1981) (cases annotated therein). *See also* Halpern, *supra* note 13, at 221.

111. *See, e.g.*, *Millar*, 577 F.2d 212; *Delman*, 73 T.C. 15.

112. *See, e.g.*, *Johnson*, 495 F.2d 1079; *Lutz & Schramm*, 1 T.C. 682.

113. *See* Halpern, *supra* note 13, at 228 (an account must be made of the after-tax investment initially credited with that amount remaining unpaid at the time of the transfer).

114. Depreciation is a return of capital. *See* Doyle v. Mitchel Bros. Co., 247 U.S. 179, 185-88 (1918) (taxable income does not include restoration of capital). Because it is a return of capital, basis is reduced. *See* I.R.C. § 1016(a)(2) (1976 & Supp. V 1981). *See generally* Simmons, *supra* note 18, at 6-14; Note, *supra* note 12, at 1511 n.85.

115. Subchapter S losses are also a return of capital. *See supra* note 38.

116. *See* Simmons, *supra* note 100, at 593-94, 604, 606-09.

117. *See supra* notes 43-59 and accompanying text.

118. *See supra* notes 29-41, 67-82 and accompanying text.

119. *See supra* note 110.

120. *See supra* note 18. *See generally* Simmons, *supra* note 54, at 20 n.82.

121. *See supra* note 34.

partners, the depreciation deductions shielded other income. The actual economic benefit[122] of the capital asset was a tax shelter, so the effect was termed a tax benefit.[123]

B. *The Economic Benefit Does Not Depend on Depreciation*

The economic benefit rule does not depend on depreciation having been claimed.[124] This is illustrated by a variation on the facts in *Tufts*. The Code might have allowed more or less depreciation than was claimed or none at all.[125] The depreciation does not trigger the rule. It is simply additional capital extracted by the partners, and is reflected by an increased gain or decreased loss by adjusting their bases downward. If the partners had pledged the property by a second nonrecourse mortgage to borrow $100,000 for purposes other than the development, when they sold their interests subject also to that mortgage, they would have in addition realized that $100,000. This additional $100,000 gain would not have been attributable to any depreciation claimed; it was never added to the basis.[126]

The Fifth Circuit held in *Tufts* that value must limit the amount realized[127] in part because the court completely misunderstood the economic benefit theory.[128] The court of appeals reasoned that any tax benefits that a taxpayer receives in the form of prior deductions are factored into the gain equation[129] by adjustment to basis.[130] Therefore, it does not appear logical that, if the property does in fact decline in value as was assumed by Congress, the taxpayer must be taxed on an amount realized that reflects a recapture of depreciation, the debt in excess of value. Adjusted basis already reflects that depreciation claimed, resulting in a double taxation on the same

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122. *See Delman*, 73 T.C. at 31 n.5 (dictum) (the court recognizes the economic benefit of the taxpayer's use of the property while limiting his liability).

123. *Id.* The tax benefit rule is codified at I.R.C. § 111 (1976 & Supp. V 1981), and it does not apply to recovery of depreciation deductions. Treas. Reg. 1.111-1(a) (1956). *Cf.* Commissioner v. Anders, 414 F.2d 1283, 1287-88 (10th Cir.), *cert. denied*, 396 U.S. 958 (1969) (earlier expenses recouped in sale of rental items preceding liquidation were not a recovery of depreciation, therefore ordinary income and not capital gain).

For a comparison of the § 111 tax benefit rule and the depreciation aspect of the economic benefit rule, see Del Cotto, *supra* note 18, at 84 n.81. For a better application and thorough analysis of the tax benefit rule, see Hillsboro Nat'l Bank v. Commissioner, 103 S. Ct. 1134, 1142-49 (1983). On the tax benefit rule generally, see Bittker & Kanner, *The Tax Benefit Rule*, 26 U.C.L.A. L. REV. 265 (1978).

124. *See* 103 S. Ct. at 1832 n.8. *See generally* Simmons, *supra* note 54, at 18-21; Note, *supra* note 12, at 1526-29.

125. Depreciation deductions are still a matter of legislative grace. *See* Perry, *supra* note 11, at 534.

126. *See* Halpern, *supra* note 13, at 225-27 (commenting that the amount realized rule of *Crane* does not depend on depreciation having been claimed, that depreciation deductions need only be indirectly taken into account).

127. 651 F.2d at 1063.

128. The court of appeals doubted the "double deduction" language in *Crane*. 651 F.2d at 1060 n.4. *See supra* note 26. The Supreme Court in *Tufts* just avoided that part of *Crane* by deciding *Tufts* on other grounds, an economic benefit theory. 103 S. Ct. at 1833 n.10. *See infra* text accompanying notes 136-37.

129. *See* I.R.C. § 1001(b). Gain equals amount realized less basis adjusted for depreciation and other returns of capital.

130. 651 F.2d at 1061.

component of gain.[131]

The court's reasoning is flawed. Depreciation is itself a return of capital, as is amount realized; they are *not* the same component of gain. The amount realized less adjusted basis serves to tax the combined recoveries of capital in excess of the original investment.

The court's reasoning can be viewed also as an erroneous assumption that the taxpayer has actually lost capital by the devaluation of the property, when in truth the taxpayer has lost capital only to the extent he has invested capital by amortization of the debt,[132] which is accounted for by the economic benefit rule.

The *Tufts* facts provide a good illustration of this erroneous assumption. The taxpayers claimed that they lost $55,740,[133] which necessarily means they invested that much more in capital than they extracted by the end of the whole transaction. This is not supported by the facts. In the course of ownership they invested only $44,212 but extracted in the form of depreciation a total of $439,722.[134] This benefit of excess capital returned to them did not depend on the value of the property. The property could have been worthless when transferred subject to the mortgage, and their economic benefit, ascertainable at the close of the transaction, would still have been calculated as above. This is where the court of appeals erred. The basis, adjusted by returns of capital, and amount realized, reflecting the investment of capital, completely account for the economic benefit. The taxpayer has not lost any capital unless he has amortized the debt as fast as he has depreciated the property.[135]

The Supreme Court in *Tufts* recognized the economic benefit of tax-free loan proceeds and that the loan proceeds would go untaxed at the close of the transaction if amount realized did not include the unpaid debt.[136] In support of this conclusion, the Supreme Court reasoned that the taxpayer loses nothing by devaluation of the property below the unpaid debt and, therefore, he should recognize no tax loss.[137]

C. Tufts *Concerns Disposal of Mortgaged Property*

Some commentators have found inconsistency between the inclusion of nonrecourse debt beyond value and the principle of discharge of indebted-

131. *Id.* at 1061 n.4. At least two commentators agree with this reasoning. *See* Newman, *The Resurgence of Footnote 37*: Tufts v. Commissioner, 18 WAKE FOREST L. REV. 1, 10 (1982); Pietrovito, Tufts v. Commissioner, *A Limitation on the Inclusion of Nonrecourse Liabilities in Amount Realized*, 11 CAP. U.L. REV. 265, 281-82 (1982).

132. The mortgagee who forecloses at a value less than the unpaid debt has a deductible loss under I.R.C. §§ 165 or 166(a)(2) (1976 & Supp. V 1981).

133. 103 S. Ct. at 1829. The taxpayers calculated their loss by subtracting the property's value, $1,400,000, from its adjusted basis, $1,455,740. *Id.* at 1829 n.1.

134. *Id.* at 1829.

135. For an excellent presentation of this unified economic benefit analysis, see Simmons, *supra* note 54, at 4, 18-21, 27-31; Simmons, *supra* note 100, at 602-09.

136. *See Tufts*, 103 S. Ct. at 1832, 1833 n.11, 1834.

137. *Id.* at 1834.

ness,[138] which relies on a freeing of the taxpayer's assets to the claims of other creditors.[139] There need not be any consistency, because the discharge of indebtedness principle originated in cases not involving the ownership and disposal of a mortgaged capital asset.[140] They are not applicable because there was not an adjusted basis and an amount realized accounting for the ultimate gain reflecting the net accession to capital at the close of the transaction.[141] As presented earlier in this analysis, such gain in value is not a function of the value of the property at disposition.

The inclusion of debt in amount realized beyond the value of the property is not inconsistent with the purchase money exception to the discharge of indebtedness principle.[142] The exception properly applies only where the debtor continues to own the property after the reduction in debt,[143] and where the parties actually agree to reduce the price of the property transferred.[144]

CONCLUSION

The Tax Court in *Tufts* reached the same result as the Supreme Court, but the implication that the recovery of depreciation deductions is the heart of the justification weakens the Tax Court's reasoning.[145] The tax shelter aspect is just the particular economic benefit that the owner values.[146] The Supreme Court did note that the basis, adjusted for depreciation as a return of capital, and amount realized, including all unpaid debt, factor in depreciation but do not depend on it[147] in accounting for the net economic benefit to the taxpayer.

The *Tufts* opinion buries *Crane*'s footnote 37.[148] Although dictum, the footnote generated much controversy and necessitated the Supreme Court's

138. Bittker, *supra* note 14, at 284; Del Cotto, *supra* note 18, at 85; Note, *supra* note 12, at 1502 n.31; Comment, *supra* note 38, at 349.

139. *See* Simmons, *supra* note 100, at 599. A nonrecourse mortgage by definition is a lien only on that asset, so its discharge frees no other assets. *See Delman*, 73 T.C. at 32. *See also id.* at 31 & n.6. The court of appeals in *Tufts*, 651 F.2d at 1062, analogized relief from nonrecourse debt to relief from future property taxes by selling the property, which provides no relief. That is a *non sequitur*. Capital gains do not need a pure debt relief justification. *See Tufts*, 103 S. Ct. at 1833 n.11 (the freeing of assets is irrelevant).

140. *See* Commissioner v. Jacobson, 336 U.S. 28 (1949) (repurchase by debtor of leasehold bonds at discount); United States v. Kirby Lumber Co., 284 U.S. 1 (1931) (retirement of corporate debt at a discount); Bialock v. Commissioner, 35 T.C. 649 (1961) (satisfaction of unsecured debts by a transfer of assets).

141. *See* Simmons, *supra* note 54, at 37 n.177. In *Tufts*, the Court chooses not to characterize the transaction as cancellation of indebtedness. 103 S. Ct. at 1833 n.11 ("We note only that our approach does not fall within certain prior interpretations of that doctrine." The freeing-of-assets theory "is irrelevant to our broader approach.").

142. *Contra* Del Cotto, *supra* note 18, at 77-79.

143. *See* Hirsch v. Commissioner, 115 F.2d 656, 658 (7th Cir. 1940). *See generally* Simmons, *supra* note 54, at 35-40.

144. *See* Millar v. Commissioner, 67 T.C. 656, 661, *aff'd in part*, 577 F.2d 212 (3d Cir.), *cert. denied*, 439 U.S. 1046 (1978).

145. 70 T.C. at 765.

146. Congress can always limit this benefit. *See, e.g.*, I.R.C. § 465 (1976 & Supp. V 1981) (taxpayer's depreciation limited to his capital at risk; presently not applicable to real estate).

147. 103 S. Ct. at 1832 n.8.

148. Crane v. Commissioner, 331 U.S. 1, 14 n.37 (dictum implying that amount realized

attention in *Tufts* to overrule the unsound court of appeals decision[149] which had briefly elevated that dictum to law.

Due to the depth of precedent to the contrary, Justice O'Connor's approach,[150] distinguishing the capital gain from the debt relief, was not persuasive to the majority. The loss to the Treasury, however, is the practical result of a Congressional policy to tax capital gains more favorably than other income.[151]

Treasury Regulation 1.1001-2(b)[152] resolved *Tufts* in advance of the appeal to the Fifth Circuit, but the court of appeals impliedly found it a distortion of amount realized.[153] The Supreme Court has sustained it with sound reasoning.

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should be limited to value). *Crane*'s footnote 37 has not been persuasive to the courts. *See Tufts*, 103 S. Ct. at 1831; *Millar*, 577 F.2d at 214; *Tufts*, 70 T.C. at 765-66; *Delman*, 73 T.C. at 29-30.

The court of appeals in *Tufts* reached a result consistent with footnote 37, based on a fundamental disagreement with *Millar*'s interpretation of *Crane* as a depreciation recapture rule, 651 F.2d at 1060-61, and based on a view of the debt relief as the economic benefit and, therefore, necessarily limited to the property's value. 651 F.2d at 1061-62. *Accord* Bittker, *supra* note 14, at 282. This reasoning overlooks the untaxed economic benefit of the loan proceeds originally. *See supra* text accompanying notes 109-23.

149. 651 F.2d 1058 (5th Cir. 1981). Had the Supreme Court not reversed the Fifth Circuit, the Treasury Department would have proposed overriding the result to Congress. *See Taxes on Parade*, Release No. 54, STAND. FED. TAX. REP. (CCH) (Nov. 4, 1981) (speech by a treasury officer to the American Institute of Certified Public Accountants).

150. 103 S. Ct. at 1836-37 (O'Connor, J., concurring).

151. I.R.C. § 1202(a). For the justifications of capital gain treatment, see Rosenberg, *Better to Burn Out than to Fade Away? Tax Consequences on the Disposition of a Tax Shelter*, 71 CAL. L. REV. 87, 100-103 (1983). *But see* I.R.C. §§ 1245, 1250 (1976 & Supp. V 1981) (taxing some of the capital gain as ordinary income).

152. Treas. Reg. § 1.1001-2(b) (1980) (value is irrelevant to amount realized). *See supra* note 6.

153. 651 F.2d at 1064 n.9. *See also id.* at 1064 (Williams, J., concurring) (expressly finding the regulation inconsistent with the plain language of I.R.C. § 1001(b)).